SUPREME COURT OF THE UNITED STATES.

No. ~~166~~. 75.

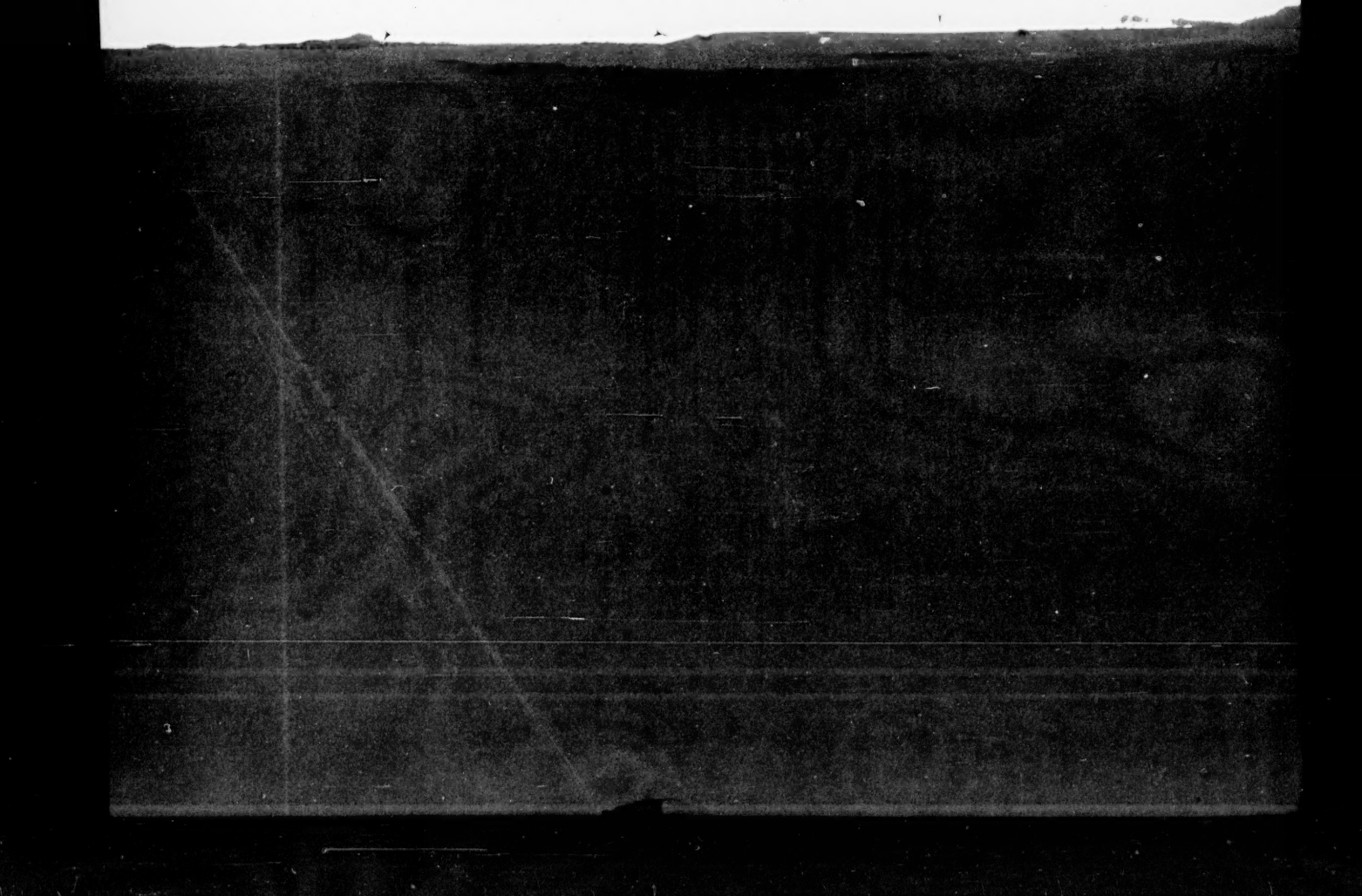
WILLIAM FREEBORN AND MARK SHELDON, PLAINTIFFS IN ERROR,

vs.

H. MARTIN SMITH AND RICHARD V. DEY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEVADA.

GOVERNMENT PRINTING OFFICE.



SUPREME COURT OF THE UNITED STATES.

No. 188.

WILLIAM FREEBORN AND MARK SHELDON, PLAINTIFFS IN ERROR,

vs.

H. MARTIN SMITH AND RICHARD V. DEY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEVADA.

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In the district court, first judicial district Territory of Nevada, county of Storey.

H. MARTIN SMITH & RICHARD V. DEY, plaintiffs.
vs.
WILLIAM FREEBORN and MARK SHELDON, defendants.

The above-named plaintiffs, residents of the county of Ormsby, territory aforesaid, and partners doing business under the name and style of "Smith & Dey," by their attorneys, Smith, Clayton & Lindsey, complain of the above defendants, residents of the county of Storey, said territory, and surviving partners of the late firm of Geo. N. Shaw & Co., and for cause of action herein aver and show that on the 8th day of July, A. D. 1861, and from that day until the 10th day of October, A. D. 1861, the said defendants and one Geo. N. Shaw were copartners, under the name and style of Geo. N. Shaw & Co., in the building, erection and ownership of a certain quartz mill, situated at Mineral Rapids on Carson river, in said territory, and that between the dates aforesaid, and at the special instance and request of the said copartnership of Geo. N. Shaw & Co., and of the said defendants, they (plaintiffs) sold and delivered to said copartnership and the said defendants lumber and building material for said quartz mill, and which were used in the building and the erection of
2 the same, of the amount and value of five thousand four hundred and fifteen $\frac{75}{100}$ dollars, all of which said sum is now due and remains unpaid, less the amount of credits herein expressly allowed and admitted by plaintiffs, to wit: the sum of $\$1,207\frac{55}{100}$ paid on the 9th day of September, 1861, the sum of $\$117\frac{00}{100}$ paid on the — day of September, A. D. 1861, and the sum of $\$304\frac{50}{100}$ paid on the 14th day of November, A. D. 1861, making the total credits of $\$1,630\frac{50}{100}$, and leaving a balance due and unpaid as aforesaid of $\$3,785\frac{24}{100}$.

And the plaintiffs aver that after the accruing of said indebtedness and in consideration thereof the said copartnership of Geo. N. Shaw & Co. and the said defendants undertook and promised to pay plaintiffs the aforesaid sum of $\$3,785\frac{24}{100}$, being the balance due as aforesaid, but to pay the same the said copartnership and the said defendants, although often requested, have hitherto failed and refused, and still do fail and refuse to pay the same or any part thereof.

And plaintiffs further show that since the sale and delivery of the lumber and materials aforesaid, and since the payments aforesaid and before the commencement of this suit, the said George N. Shaw, copartner of the said defendants as aforesaid, departed this life in the said county of Storey and Territory of Nevada.

Wherefore, the premises considered, plaintiffs demand judgment against the said defendants for the sum of three thousand and seven hundred and eighty-five $\frac{24}{100}$ dollars, with legal interest and the costs of this suit.

SMITH, CLAYTON & LINDSEY,
Attorneys for Pl'ffs.

3 TERRITORY OF NEVADA,
County of Ormsby, ss:

On this 16th day of January, A. D. 1861, before me, a notary public within and for said county, personally appeared Richard V. Dey, who, being first duly sworn, says that he is one of the above named plaintiffs; that he has heard the foregoing complaint read and knows the contents thereof; and that the same is true of his own knowledge, except the matters therein stated on his information and belief, and that as to those matters he believes it to be true.

RICHARD V. DEY.

Subscribed and sworn to by R. V. Dey, before me, on the day and year above written, as witness my hand and official seal.
[SEAL.]
P. WARREN VAN WINKLE,
Notary Public.

Endorsed: 1st judicial district. Smith & Dey *vs.* Freeborn & Sheldon. Complaint. Filed in my, at Virginia city, this 17th day of January, A. D. 1862.
D. M. HANSOM, *Clerk.*
SMITH, CLAYTON & LINDSEY, *for Pl'ffs.*

4 *Answer.*

District court, 1st judicial district.

TERRITORY OF NEVADA,
County of Storey.

H. MARTIN SMITH and RICHARD V. DEY, Pl'ffs,
vs.
WM. FREEBORN and MARK SHELDON, Def'ts.

Now come the said defendants, and for answer to the complaint of plaintiffs filed herein say that they deny that they, or either of them, are surviving partners of the late George N. Shaw, or of the firm of George N. Shaw & Co. Defendants further deny that on the 8th day of July, 1861, or any other day, or from that day or from any time whatever until the 10th day of October, 1861, or until any day or time whatever, that they or either of them, with said George N. Shaw, ever were copartners under the name or style of George N. Shaw & Co., or otherwise, in the building, erection or ownership of a certain quartz mill situated at Mineral Rapids on Carson River, or otherwise; or that between the dates aforesaid, or between or at any days or time whatever, at the special instance or request of said

defendants or either of them, the said plaintiffs sold or delivered to said defendants or either of them any lumber or building material for said quartz mill or for any other purpose whatever, of the amount or value of $5,415\frac{73}{100}$, or of the amount or value of any sum of money whatever, or that the sum of $3,785\frac{24}{100}$, (alleged balance,) or any part thereof, or any sum of money whatever, is now or unpaid from said defendants or either of them to said plaintiffs.

5 Said defendants, further answering, aver that they nor either of them ever were the copartners of the said George N. Shaw in the said quartz mill, or had or owned or possessed any interest whatever of in or to said quartz mill property, or any part thereof, except as hereinafter particularly set forth; that they or either of them ever purchased or received of or from said plaintiffs any lumber or building material whatever, for the purposes of said quartz mill, of any value whatever.

Said defendants, further answering, deny that they or either of them ever, in consideration of said pretended indebtedness or otherwise, undertook or faithfully promised to pay said plaintiffs or either of them said sum of $3,785\frac{24}{100}$, or any part thereof, or any sum of money whatever.

Said defendants, further answering, aver that on or about the 20th day of June, A. D. 1861, and about the time that the said George N. Shaw commenced the construction of said quartz mill, the said defendants loaned to the said George N. Shaw the sum of $12,000 00, and then and there took a mortgage upon the mill site, quartz mill property, to secure the payment of the same according to the terms and conditions thereof.

Defendants further aver that, on or about the 4th day of October, 1861, and after the alleged sale and delivery of the lumber and building materials mentioned in said complaint, the said George N. Shaw, being the sole owner of said quartz mill and property, and being embarrassed, and unable to further continue the construction of the said property, and being unable to pay to said defendants said sum of money so loaned and secured by mortgage, and to comply with the conditions of said mortgage, said defendants were com-

6 pelled to purchase said property, and said George N. Shaw, then and there, in consideration thereof, granted, bargained, sold and conveyed to the said defendants the said quartz mill and property, in the following proportions, to wit:

The said defendant Wm. Freeborn $\frac{51}{100}$ thereof, and to the said defendant Mark Sheldon $\frac{49}{100}$ thereof. That said defendants thereupon entered into the possession of said property as the owners thereof, and have since said time continued in the possession of the same as the sole owners thereof.

Defendants further say that they nor either of them have ever assumed or agreed to pay or become in any way or manner liable or responsible for the said alleged claim or demand set up in plaintiffs' complaint of the value and amount of $3,785\frac{24}{100}$, or any part thereof, or any other sum of money whatever due said plaintiffs.

Defendants further say that if any such lumber and building material was obtained, and such indebtedness incurred, it was done,

procured and had at the special instance and request of said George N. Shaw, on his own responsibility, long before the said defendants or either of them became interested in said mill property, and that they nor either of them are not liable therefore, or any part thereof.

Defendants say that the plaintiffs never made demand upon them for the payment of any sum of money whatever.

Wherefore defendants pray that said complaint be dismissed, and that they have judgment against said plaintiffs for their costs in this behalf sustained, &c.

STEWART, KIRKPATRICK & RISING,
Att'ys for Def'ts.

TERRITORY OF NEVADA,
County of Storey, ss:

7 Mark Sheldon, one of said defendants, being duly sworn, deposes and says that he has heard read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and that as to those matters he believes it to be true.

MARK SHELDON.

Subscribed and sworn to before me this 29th day of January, 1862.
D. M. HANSOM,
Clerk 1st District Court.

TERRITORY OF NEVADA,
County of Storey, ss:

I, David M. Hanson, clerk of the United States district court of the first judicial district in Nevada Territory, do hereby certify that the above and foregoing is a full, true, and correct copy of the original, which now remains on file in my office at Virginia City, said county and Territory.

In testimony whereof I have hereunto set my hand and affixed the [SEAL.] seal of said court, this 30th day of January, A. D. 1862.
D. M. HANSON,
Clerk of First District Court, N. T.

Endorsed: 1st district court, H. Martin Smith *et al. vs.* Wm. Freeborn *et al.* Answer. Copy.
STEWART, KIRKPATRICK & RISING,
Att'ys for Def'ts.

8 *Replication.*

In the district court, 1st judicial district.

TERRITORY OF NEVADA,
County of Storey, ss:

H. MARTIN SMITH and RICHARD V. DEY, Pl'ffs,
vs.
WILLIAM FREEBORN and MARK SHELDON, Def'ts.

Now come the said plaintiffs and for replication to the new matter set up in the answer of the said defendants deny, upon information

and belief, that the said defendants, on or about the 20th day of June, A. D. 1861, or at any other time, loaned to the said George N. Shaw the sum of $12,000 00, or any other sum, or that they then or at any other time took a mortgage upon the said mill site and quartz mill property, or any parcel or portion thereof, to secure the payment of said sum, or any part thereof.

And the said plaintiffs, further replying, admit, upon information and belief, that said George N. Shaw, on or about the 4th day of October, A. D. 1861, did execute to defendants a deed of the property mentioned; but, upon like information and belief, they deny that said George N. Shaw was then the sole owner of said quartz mill and property, or that he was embarrassed or unable to further continue the construction of said property, or to comply with the conditions of the said pretended mortgage, or that defendants were compelled to purchase said property; and, on the contrary, plaintiffs, upon information and belief, aver that the said deed was executed without any good or valuable consideration, and for the fraudulent
9 purpose and design of covering up the real connexion of the said defendants, as the partners of the said George N. Shaw, and to hinder, delay, and defraud the creditors of the said copartnership firm of Geo. N. Shaw & Co.

And the said plaintiffs, for further reply, deny that the indebtedness sued for, or any part thereof, was incurred, or the said lumber and building material, or any part thereof, was obtained, procured, or had, at the special instance and request of the said Geo. N. Shaw on his own responsibility.

But, on the contrary, pl'ffs aver and say that for and during the whole period within which the said lumber and building materials were being sold and delivered, as alleged in said complaint, the said defendants were, and reputed, and held themselves out, and were reputed and held out by the said Geo. N. Shaw as his partners in the building, erection, and ownership of said quartz mill. And plaintiffs further say that, upon the faith and responsibility of such copartnership connexion, they were induced to sell and deliver to the said defendants and the said Geo. N. Shaw, as copartners, the lumber and building materials to be used by them in the building and erection of said mill; and they aver that def'ts are liable for the value thereof, as alleged in complaint. Wherefore pl'ffs ask judgment against def'ts for the sum demanded in their complaint.

SMITH, CLAYTON & LINDSEY,
Att'ys for Plff's.

10 *Statement of motion for new trial.*

1ST DISTRICT COURT, *Storey County.*

J. MARTIN SMITH *et al.*
vs.
WM. FREEBORN *et al.*

1. The said action came on regularly for trial upon the pleadings; and a jury of eleven men having been duly sworn and empannelled,

and by consent that number was taken, and the plaintiffs, to maintain their action, called—

Jonas S. Aiken, who, being duly sworn, testified: I was employed by Col. Brevoort, some time in June, 1861, to build a water-mill on Carson river, at Mineral Rapids. Mr. Freeborn came to the mill about the 1st of July, 1861. I had a conversation with him. I was at work on some drawing, and the men were at work dressing the battery timbers. He said to me "My name is Freeborn, I suppose you know me by reputation." I said I had heard Mr. Shaw speak of him.

He said he did not think there were timbers enough in the batteries, and said the timbers were not strong enough. He said he was interested in the mill, and did not think that the timber I was putting into the battery was according to the contract. He was down several times, and looked about the works. I told him the timber was good for this country. He evinced considerable interest in the works; asked after the hands, how they were fed, and how they worked. I was present at the time Orear made contract to dig the race.

After Freeborn and Sheldon took possession of the mill I
11 had a conversation with Freeborn about my bill; he refused to pay it, because, he said, it was Shaw's debt, not his. Geo. N. Shaw & Co. owed me for work before October. Jones settled with me and paid me part, and afterwards some in October. I think he brought me a receipt from Size & Co. for $100, which he had settled for me there. They paid all the hands off.

Freeborn said to me if I wanted my money I could have it. At the time Jones settled with me he agreed to pay the $100 to Size if it was counted in. Jones gave me the receipt some time in October, but the amount was charged to me before that time. Freeborn wanted me to make some changes, but I refused to do so, because Shaw told me to make no changes without an order from Col. Brevoort.

Cross-examined.

I did not recognise Freeborn's authority.

S. B. Maynard testified: Was employed on the 10th day of July last by Aiken to work on the mill. Saw Freeborn there several times; did not know his name then, but know it now. Aiken was absent. I was having battery timbers dressed. Freeborn said he did not think the timbers were suitable. I told him I thought they were. He said he was interested in the mill.

E. H. Sise testified: I sell goods at Dayton. Sold goods to the firm of Geo. N. Shaw & Co., and also to George N. Shaw. He was building two mills—one a steam-mill. A part of my bill against George N.
Shaw & Co.—$100, I believe—was paid on the 12th of October
12 by draft, drawn by either Freeborn or Freeborn & Sheldon, on San Francisco. Don't know on whom the draft was drawn on San Francisco; but I suppose it was paid. I gave it to Harrington

& Co., and heard no more about it. I credited it on the account of George N. Shaw & Co.—that was the understanding. The articles were bought by G. N. Shaw & Co. in June or July, 1861. The balance of my bill is not paid, and my claim is situated the same as plaintiffs'

David Orerar testified: I worked on the race. Commenced to work on the race for G. N. Shaw & Co. on the 1st May, 1861. Worked 5 or 6 weeks there. First saw Freeborn on the 5 or 6th of July, 1861. I afterwards had several jobs on the ditch. Heard conversation between Workwell and Freeborn in July last, when Workwell met Freeborn and called him Shaw. Freeborn said my name is not Shaw, it is Freeborn. Workwell said I suppose it is all the same, that you are partner in the mill. Freeborn said yes, but then remarked that I am not a partner, but I am indirectly interested; it all stands in Shaw's name now, but I expect to be soon. On the 1st of October G. N. Shaw & Co. owed me $700. October 6th Jones paid me $200. November 8th Shaw paid $150. I asked Shaw for the money. He said he would get it from Freeborn, and Freeborn said he had given him the money for me. There is yet $306 due. I saw Freeborn several times at mill. I asked for my money after he took possession, and he said he did not owe me. When I made contract with Jones—about 1st of September—I asked who composed the firm of Geo. N. Shaw & Co., and he said Shaw and Freeborn an Sheldon.

13 A. E. Davis testified: I was introduced to Freeborn by Shaw, in San Francisco, about the 1st of July last. I told him I was interested in building a mill in Washoe. He said he was also interested with Shaw in building one at Dayton, in Nevada Territory.

A. J. Markwell testified: Said he kept a hotel at Dayton. I met Freeborn. I did not know him then, and don't now. I took him for Shaw. He said his name was not Shaw, but it was Freeborn. I said I suppose you are a partner in the mill. He said he was interested indirectly. Orear was present at the time of the interview.

J. C. Hines testified: After Freeborn went into the possession of the mill I asked him about a bill of about $1,000 which I had against G. N. Shaw & Co. for lumber. Freeborn said it was not for him to pay it, but he thought Shaw would be in circumstances after a while to pay, and that he would pay it. Jones paid me $100, but not by the order of Freeborn. Freeborn was present in the office when Jones paid me, but said nothing.

O. Crandell testified: Had a conversation with Freeborn in October, when he said he had the whole mill now, and wanted a good millwright. I did not then know any one whom I could recommend.

Henry Gregory testified: On the 30th day of August Shaw drew on Mark Sheldon in my favor on the bill of lumber furnished by Smith & Dey for $1,500, which was paid by Sheldon.

14 James Mills testified: Was in the parlor of Virginia Hotel, in Virginia City, in October or Nov'r last, when both Shaw and Freeborn had the rheumatism, and Shaw called Freeborn my rheumatic partner.

Jas. Z. Kelly testified: Was employed by Aiken on the mill. I saw Freeborn at the mill in July or August last. Freeborn complained of some of the timbers, and said they were not fit.

Plaintiffs then offered in evidence the original contract between the defendants and the said George N. Shaw, which is as follows:

Mortgage.

This indenture, made and entered into this 20th day of June, A. D. 1861, by and between George N. Shaw, of Silver City, county of Carson, Territory of Nevada, party of the first part, and William Freeborn and Mark Sheldon, of the city and county of San Francisco and State of California, parties of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of twelve thousand dollars, lawful money of the United States of America, to be paid as follows by said second parties: three thousand dollars in hand, the receipt whereof is hereby acknowledged, four thousand dollars on the last day of July, 1861, and five thousand dollars on the last day of August, 1861, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey, unto the said parties of the second part, their heirs and assigns, all that certain or parcel of land situate, lying, and being in the town of Mineral Rapids, county of Carson and Territory of Nevada, and described
15 as follows, to wit: Blocks numbered fifty-six, (56,) fifty-five, (55,) fifty-four, (54,) fifty-three, (53,) fifty-two, (52,) fifty-one, (51,) fifty, (50,) forty-nine, (49,) forty-eight, (48,) forty-four, (44,) forty-five, (45,) sixty-eight, (68,) and fifty-seven, (57,) on the map of said town of Mineral Rapids, as surveyed by McBride in February, 1860; and also all the right, title, and interest of said party of the first part in and to the waters of Carson river at the point on said river where the same is intersected by the ditch constructed by Shaw and Patterson; and also all the right, title, and interest of the said party of the first part in and to the said ditch, and the waters flowing and to flow therein, and all the water-privileges and water-power to be derived therefrom, together with all and singular the rights, tenements, franchises, and hereditaments thereto belonging, to have and to hold the same to these said parties of the second part, their heirs and assigns, forever. This conveyance is intended as a mortgage, and is subject to the following contract and conditions: The said party of the first part hereby agrees to build and construct on said premises a good and substantial twenty-four stamp quartz mill, to be propelled by the water flowing through the said ditch, with forty-eight Hungarian bowls for amalgamation, and concentrators of the most approved and practicable kind for saving the sulphurets; also to construct a

good and substantial flume to convey the water of the said ditch to the mill—said mill to be located where the greatest practicable fall of water can be procured; also to construct a good dam across the said Carson river, at the upper terminus of the said ditch, of
16 sufficient height to turn the water of said river into ditch; and also to construct all necessary and proper buildings and improvements usually connected with a first class quartz mill of the capacity above specified. Said quartz mill and other improvements above described are to be constructed and completed by said party of the first part at his own proper cost, charge, and expense, with reasonable diligence and within a reasonable time, and at a cost not to exceed seventeen thousand dollars. And when and as soon as said mill and improvements are completed the said party of the first part hereby agrees and binds himself to convey, by a good and sufficient deed of conveyance, to the said parties of the second part, their heirs and assigns, fifty-one one-hundredths ($\frac{51}{100}$) of the said quartz mill and appurtenances, improvements, real estate, and all other property herein above described; and the said party of the first part hereby binds himself to have the said quartz mill and improvements completed before the 1st day of January, 1862.

The said parties of the second part hereby agree and bind themselves to *to* advance to said first party the said sum of twelve thousand dollars, in the manner and at the said several times herein above set forth: Now, therefore, if the said party of the first part shall well and truly construct, or cause to be constructed, the said quartz mill and other improvements in a good, substantial, and workmanlike manner, and upon the completion thereof deed and convey to the said parties of the second part fifty-one one-hundredths ($\frac{51}{100}$) thereof, as herein above set forth, then and in that event the foregoing conveyance shall be void.

17 But in case the said parties of the second part shall comply with the covenants herein above set forth to be performed by them, and the said party of the first part shall fail to comply with the covenants and agreements to be performed by him, to wit, to construct said mill and other improvements, as above set forth, and convey to the said parties of the second part fifty-one one-hundredths ($\frac{51}{100}$) of the above described property as herein provided, before the first day of January, 1862, then and in that event the said parties of the second part are hereby authorized and empowered to enter into and take possession of the whole of said premises, and to hold the same and every part thereof, without other or further proof of re- and conveyances. But if the said party of the first part shall perform his laborers with his said covenants and agreements, then this instrument shall be void.

In witness whereof said parties of the first and second part have hereunto set their hands and seals that date first above written.

GEO. N. [illegible] had, in addition to the agreement, upon which the same is to be used on the argument.

WM. FR[illegible]

MARK[illegible] the correspondence bearing the time of the alleged

James Mills testified: Was in the parlor of Virginia Hotel, in Virginia City, in October or Nov'r last, when both Shaw and Freeborn had the rheumatism, and Shaw called Freeborn my rheumatic partner.

Jas. Z. Kelly testified: Was employed by Aiken on the mill. I saw Freeborn at the mill in July or August last. Freeborn complained of some of the timbers, and said they were not fit.

Plaintiffs then offered in evidence the original contract between the defendants and the said George N. Shaw, which is as follows:

Mortgage.

This indenture, made and entered into this 20th day of June, A. D. 1861, by and between George N. Shaw, of Silver City, county of Carson, Territory of Nevada, party of the first part, and William Freeborn and Mark Sheldon, of the city and county of San Francisco and State of California, parties of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of twelve thousand dollars, lawful money of the United States of America, to be paid as follows by said second parties: three thousand dollars in hand, the receipt whereof is hereby acknowledged, four thousand dollars on the last day of July, 1861, and five thousand dollars on the last day of August, 1861, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey, unto the said parties of the second part, their heirs and assigns, all that certain or parcel of land situate, lying, and being in the town of Mineral Rapids, county of Carson and Territory of Nevada, and described
15 as follows, to wit: Blocks numbered fifty-six, (56,) fifty-five, (55,) fifty-four, (54,) fifty-three, (53,) fifty-two, (52,) fifty-one, (51,) fifty, (50,) forty-nine, (49,) forty-eight, (48,) forty-four, (44,) forty-five, (45,) sixty-eight, (68,) and fifty-seven, (57,) on the map of said town of Mineral Rapids, as surveyed by McBride in February, 1860; and also all the right, title, and interest of said party of the first part in and to the waters of Carson river at the point on said river where the same is intersected by the ditch constructed by Shaw and Patterson; and also all the right, title, and interest of the said party of the first part in and to the said ditch, and the waters flowing and to flow therein, and all the water-privileges and water-power to be derived therefrom, together with all and singular the rights, tenements, franchises, and hereditaments thereto belonging, to have and to hold the same to these said parties of the second part, their heirs and assigns, forever. This conveyance is intended as a mortgage, and is subject to the following contract and conditions: The said party of the first part hereby agrees to build and construct on said premises a good and substantial twenty-four stamp quartz mill, to be propelled by the water flowing through the said ditch, with forty-eight Hungarian bowls for amalgamation, and concentrators of the most approved and practicable kind for saving the sulphurets; also to construct a

good and substantial flume to convey the water of the said ditch to the mill—said mill to be located where the greatest practicable fall of water can be procured; also to construct a good dam across the said Carson river, at the upper terminus of the said ditch, of
16 sufficient height to turn the water of said river into ditch; and also to construct all necessary and proper buildings and improvements usually connected with a first class quartz mill of the capacity above specified. Said quartz mill and other improvements above described are to be constructed and completed by said party of the first part at his own proper cost, charge, and expense, with reasonable diligence and within a reasonable time, and at a cost not to exceed seventeen thousand dollars. And when and as soon as said mill and improvements are completed the said party of the first part hereby agrees and binds himself to convey, by a good and sufficient deed of conveyance, to the said parties of the second part, their heirs and assigns, fifty-one one-hundredths ($\frac{51}{100}$) of the said quartz mill and appurtenances, improvements, real estate, and all other property herein above described; and the said party of the first part hereby binds himself to have the said quartz mill and improvements completed before the 1st day of January, 1862.

The said parties of the second part hereby agree and bind themselves to *to* advance to said first party the said sum of twelve thousand dollars, in the manner and at the said several times herein above set forth: Now, therefore, if the said party of the first part shall well and truly construct, or cause to be constructed, the said quartz mill and other improvements in a good, substantial, and workmanlike manner, and upon the completion thereof deed and convey to the said parties of the second part fifty-one one-hundredths ($\frac{51}{100}$) thereof, as herein above set forth, then and in that event the foregoing conveyance shall be void.

17 But in case the said parties of the second part shall comply with the covenants herein above set forth to be performed by them, and the said party of the first part shall fail to comply with the covenants and agreements to be performed by him, to wit, to construct said mill and other improvements, as above set forth, and convey to the said parties of the second part fifty-one one-hundredths ($\frac{51}{100}$) of the above described property as herein provided, before the first day of January, 1862, then and in that event the said parties of the second part are hereby authorized and empowered to enter into and take possession of the whole of said premises, and to hold the same and every part thereof, without other or further proceedings and conveyances. But if the said party of the first part shall comply with his said covenants and agreements, then this instrument shall be void.

In witness whereof said parties of the first and second parts hereunto set their hands and seals that date first above written.

GEO. N. SHAW. [SEAL.]
WM. FREEBORN. [SEAL.]
MARK SHELDON. [SEAL.]

Signed, sealed, and delivered, in presence of—(N. B. The words "and if they fail to make each of the said several advances then this instrument shall be void" in the 9th, 10th, and 11th lines of the 4th page, erased before signing)—

WM. M. STEWART.
M. KIRKPATRICK.

TERRITORY OF NEVADA,
County of Carson.

On this twenty-first day of June, A. D. 1861, before me, T.
18 A. Waterman, a justice of the peace in and for precinct No. 7, county and Territory aforesaid, personally appeared the within named Geo. N. Shaw, Wm. Freeborn, and Mark Sheldon, whose names are subscribed to the annexed instrument as parties thereto, personally known to me to be the individuals described in and who executed the said annexed instrument, who acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein set forth.

Given under my hand this day and year first above written.

T. A. WATERMAN,
Justice of the Peace.

Endorsed: George N. Shaw to and with Freeborn & Sheldon. Mortgage and agreement. Filed for record June 22d, A. D. 1861, at 15′ past 2 o'clock p. m., and recorded in book "A" of mortgages, records of Carson county, on pages 127, 128, and 129.

EDW. C. MORSE,
County Recorder,
By ALFRED HELUN,
Deputy.

Plaintiffs then called a witness to prove the amount due them, and also that the lumber for which suit is brought was used in the building and erection of the quartz mill mentioned in the pleadings. These facts as stated in the complaint being admitted by the defendants, plaintiffs then rested their case.

Defendants then called Cyrus W. Jones, who testified that he
19 was employed by G. N. Shaw in July last as agent and book-keeper at the said mill; that he had known the said Shaw for many years, and for the last ten or eleven years in California; that he had known him to do business under the assumed name of George N. Shaw & Co., when he had no partners in fact; that was his usual way of doing business. He was hired by Shaw, and only knew Shaw in the business. He knew Freeborn and Sheldon had a mortgage on the property, but no other interest. While I was making a contract with Orear to dig on the race he asked me who were the firm of G. N. Shaw & Co. I told him about Freeborn and Sheldon's mortgage. I never told him Freeborn and Sheldon were partners of Shaw, but that they might become partners at some future time. I paid all the bills with money furnished by G. N. Shaw. In September Shaw

became embarrased, and unable to go on with his contract and complete the mill. He became largely in debt, and the creditors became clamorous.

About the 1st of October Freeborn and Sheldon came up from San Francisco, and Shaw told me to make out a statement of the condition of the accounts, as he must make some other arrangements. I afterwards went to Virginia; and Shaw, Freeborn, and Sheldon were there. They told me they were making arrangements. I told Shaw I must have money to pay the bills. He said that I intend to fix it soon. Soon after Shaw and Freeborn came to the mill and told me they had made an arrangement, and Shaw gave Freeborn possession of the mill. They then told me that the men were to be paid; that between 5 and $6,000 had been advanced by Freeborn and Sheldon to pay up the most pressing demands; that all of the laborers were to be paid
20 by Shaw out of the money so advanced. I interfered in favor of Size & Co., and told Shaw that he must be paid some, which was done. The laborers were all paid by me, and many other little bills which were then agreed to be paid. Freeborn and Sheldon paid none of these bills, except what I paid with the money so advanced. During the time I was there Smith and Dey often came for money. They wanted money from Shaw, and from time to time enquired when Shaw would get money for them. On one occasion—some time before the death of Shaw—I had a conversation with plaintiff Dey, on which Dey told me that the contract for the lumber was originally made with Gregory; that when they took the saw mill they also agreed to fill the contract; that Gregory then told him that Shaw was not rich, but that he was industrious and honest, and quite lucky in his speculations, and that he thought it was safe to trust him with the lumber. Some time after Freeborn and Sheldon took possession of the mill Dey asked me if Freeborn would not pay the bill. I told him that Freeborn had nothing to do with the bill, that it belonged to Shaw to pay, and told him to make out the bills separate the 1st of October. Dey then said he was going to see George. He further testified that he kept the books for Freeborn and Sheldon after they took possession; that he opened an account with Freeborn and Sheldon, and took the receipts in their names, but continued to keep the mill accounts in the same books; that he did this without any direction from any one, but because he heard Shaw had a right of redemption, and that it would be necessary to have the whole cost of the mill. He testified to various receipts making up the $12,000 00 agreed to be advanced by Freeborn and Sheldon on the mortgage, and also a quantity of re-
21 ceipts showing that the money agreed to be paid to the laborers had been advanced.

He then showed, from the books, that the defendants had, in addition to the $12,000, advanced about $5,000, as per agreement, upon taking possession of the mill, and about $20,000 more in completing the mill. (All of which are referred to, and will be used on the argument of this motion.)

The defendants then offered in evidence the correspondence between Freeborn and Sheldon and Shaw, during the time of the alleged

copartnership; the plaintiffs objected to them as evidence. The court sustained the objection and excluded the evidence. Whereupon the defendants excepted to the ruling, and presented and have signed the following bill of exceptions:

Bill of exceptions.

SMITH and DEY,
vs.
FREEBORN and SHELDON.

Be it remembered that on the trial of the above-entitled action, the defendants, in order to prove the issue on their part, offered in evidence a number of letters and telegraphic dispatch, containing the correspondence between G. N. Shaw, the person alleged to be a partner of the said Freeborn and Sheldon, for the purpose of showing the relation between the parties; said letters and dispatch being marked 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, and hereto attached and made a part of this bill of exceptions.

The counsel for the plaintiff objected to the said evidence, on the ground that the same was irrelevant. The court sustained the objection and ruled out the said evidence, and the defendants
22 then and there, at the proper time, by their counsel, excepted.

GORDON N. MOTT,
Dist. Judge 1st District.

[Error of the clerk of district court.]

"CALIFORNIA STATE TELEGRAPH COMPANY.

"Messages sent to all the principal cities and towns in the United States. Office hours from 8 a. m. to 9 p. m. Sundays 9 to 11 a. m. and 6 to 8 p. m.

"The public are requested to report, by letter, to the superintendent at San Francisco any cause of dissatisfaction. Terms and conditions on which messages are received and transmitted.

"The public are notified that, in order to guard against mistakes in the transmission of messages, every message of importance ought to be reported back, for which service fifty per cent. in addition to the regular tariff will be charged. In case of delay and mistakes on its own lines, this company will refund the amount paid for sending the message, and no more unless the message be repeated back, and in that case the company will be responsible for actual damage only, to an amount not exceeding fifty times the sum paid for sending the message, but in no case will the company be responsible for delays arising from interruptions in the working of its telegraphs, nor will it in any case be responsible for dispatches sent beyond its own lines.

"The following message is transmitted and delivered subject to the foregoing conditions.

"JAS. GAMBLE, *Superintendant.*
"H. W. CARPENTIER, *Pres't.*"

VIRGINIA, *Sept. 20th*, 1861—9. 17. *a. m.*

To WM. FREEBORN, care of Castle and Freeborn. Can you
23 grant me any credit? Let me know by telegraph at once. I am about cornered.

G. N. SHAW.

17. Pd. V.

SAN FRANCISCO, *Sept. 20th*, 1861.

GEO. N. SHAW, esq'r, *Virginia City.*

DEAR SIR: I wrote you on the 18th inst. relative to claim of George Hurst on ditch, which I expect is all right; I hope to hear from you relative to same by Monday. I saw Mark this morning before I received your telegraph. He said he could not possibly raise the money without borrowing. I shewed him afterwards your telegram, and proposed that you should draw on me for $1,000 00, he to stand one half, to which he assented. I accordingly telegraphed to you to that effect. I hope the same will help you somewhat. You state, in your letter, that you can get (you think) $20 per foot for Union; if so, you can sell 100 feet of mine and apply the money on mortgage as you proposed. It is very strange that I never heard of the Hurst claim either from you, Jo. Clark, Steward, Strong, and others, who were fully cognisant of it; and still stranger that I should hear of it from two parties in two days without inquiry on my part.

Whether I shall procure you any money on mortgage or not I cannot say. I am, however, debarred from trying until you explain the Hurst claim. I have not mentioned it to Mark.

Hoping you will not be necessitated to sacrifice any of your
24 property, I remain, very truly yours,

WM. FREEBORN.

SAN FRANCISCO, *Sept'r 17th*, 1861.

GEO. N. SHAW, esq'r, *Virginia City.*

DEAR SIR: I called to-day on the Vulcan Iron Works. Mr. Torkay was not prepared to say what amount of damages he claims. He has agreed to make up a statement of the amount of work done, (about $4,000,) his claim for damages, &c., &c., to morrow, by noon. He says that he has already written to you, and has sent you a statement, &c., &c. I wish you would write me your ideas on the subject; my knowledge of such things is very limited, and I should prefer to hear from you before making any settlement. I have not seen Mark to-day; cannot find him; he is deeply engaged in negociating for 30 feet in Gold Hill; if he does not make the negociation there will be some chance of making the arrangement with him. I am going to try some outside parties to-morrow. Hope I shall succeed.

I went to see Mrs. Shaw, but she was not at home; will call again this or to-morrow evening; the servant said they were all well.

Nothing doing in stocks. Central, $500 offered and declined. Cal'a, $450; Ophir, nominal; no sales.

Very truly y'rs, &c.,

WM. FREEBORN.

25 CARSON CITY, *Sept'r 17th*, 1861.

GEORGE N. SHAW, esq'r, *Virginia City.*

DEAR GEORGE: I arr'd all O. K. this evening, and went immediately to see Smith & Dey, and enclosed you will find mem'. of lumber sent. The last, as you will see, was shipped on Sunday, and should have been at the mill certainly before you were to-day; but it is probably there by this time. They say this makes your order *complete*, aside from the shingles, which they assure me shall all be at the mill by Sunday next. The lot shipped on the 7th was left at the bridge as the teamster broke his wagon and could not take it any further. I shall be back to Virginia by to-morrow eve'g.

Yours, truly,

IRA A. EATON.

SAN FRANCISCO, *Sept'r 16th*, 1861.

GEO. N. SHAW, esq'r, *Virginia City.*

DEAR SIR: As you predicted, I have not been able to induce Mark to do anything. He says he would be perfectly willing to go in with me (one-half) for $5,000, if he had the money. I am inclined to think he is honest, as he now has $16,000 in Washoe, some $12,000 in butter, sold and not paid for. He has also some investments in property which will pretty nearly make up the amount of his
26 capital. I used all the arguments I could think of, and even went so far as almost to quarrel with him. I do not despair, however, of success, altho' as yet I have formed no definite plan.

My own position is such that I *cannot* advance the money myself without borrowing. As a matter of precaution, that I might not be induced to take any *chances*, I placed all my means for a definite period previous to my last trip up.

I have not as yet had time to attend to any other business of yours, but will do so to-morrow. I found on my arrival at Folsom that Perkins had shipped the wheel and nearly all the machinery received by him. Enclosed you will find receipt of one case of wine, shipped by Meeker on the *Crysopolis*, which he says is all he has shipped.

I will write you again to-morrow.

Very truly yours, &c.,

WM. FREEBORN.

SAN FRANCISCO, *Sept. 18th*, 1861.

GEO. N. SHAW, esq'r, *Virginia City.*

DEAR SIR: I learned last evening, incidentally, that a Mr. George Hurst had advanced the money to build the ditch on Carson river, and that he owned an interest in same. I wish you would write me if it is so; also all the particulars. In any negociation I should make for you I shall feel obliged to state what cloud there was on your title.

27 The Vulcan Iron Works make the amount of work done as follows:

Boiler	$1,420 99
Battery	466 84
Engine	1,253 10
Grinders, &c.	305 06
Percussion tables and amalgamators	342 24
Making in all	$3,788 23

On which they claim as follows:

Damages not less than		$1,000 00
They allow for the engine	$1,253 10	
" " " boiler	1,000 00	
" " " rest of work	600 00	
	$2,853 10	
Making a difference of		935 13
Total amount of claim against you		$1,935 13

I have been to see Polhemus to sell the boiler for the Mexican. He sends up the size, &c., to-day, and if it suits I can probably sell it to him at $200 or $250 less than cost. I told the parties that you would probably want the same machinery in the spring. They said if that was so, they would allow you the amount paid them, less interest on money invested, provided they did not find a purchaser in the meantime. I think $1,500 would be a fair allowance. Let me know your ideas, and how you propose payment, &c.

Do not fail to send items relative to ditch.

Yours, very truly, WM. FREEBORN.

VIRGINIA CITY, *Sept. 17th*, '61.

WM. FREEBORN, esq'r, *San Franc'o.*

28 MY DEAR SIR: I received y'r telegram, which disappointed me much. I have not rec'd your letter, but presume Mark has good reason for refusing. I must have the credit or the money to enable me to carry thro' the work properly, and some of it at once, or stop the work for the present, until I can turn myself. I have already expended on the property fifteen thousand five hundred dollars, and shall be obliged to spend ten thousand more before the work is completed and quartz at the mill to commence running. The security I offer should be considered good by any person understanding the property. I do not flinch from my bargain, neither do I complain of Mark for not taking hold. If necessary I shall dispose of my whole interest if I can find a buyer to enable me to carry out my agreement. I yet have a faint hope that you will succeed in making the raise for me of $5,000 on one-half my interest, or $10,000 on the

whole. Write me fully and promptly as I have got to act quick, nay, freight is all coming in, and it tries me much to get cash to meet daily demands. My claim at Gold Hill is looking much better, and I hope soon to get returns. Union ground is looking up, and I was told by Farrington that $20 per foot was offered to-day. I shall find the customer if I can and sell some at that price.

Yours, very truly,

GEO. N. SHAW.

VIRGINIA CITY, *Sept.* 18*th*, 1861.

29 WM. FREEBORN, esq'r, *San Francisco.*

MY DEAR SIR: Your favor of the 16th inst. I rec'd this evening. I wrote you last evening stating my position. I respect Mark's prudence, but it is well he should know my circumstances. It does not require immediate cash, as by my placing the security in your hands, (which, with your knowledge of the property, should be considered good security,) with your joint credit, you would be able with ease to open a credit for me with Daniel Meyer, or any other banker or loaner. By doing this you will give me a little time to turn myself, and I think it will be for the benefit of all. I am perfectly willing to submit to any sacrifice to carry the thing thro' if I come out with but a trifling interest. I feel as though I was perfectly alone, without any credit, with all my payments to make for freights, labor, &c. I know if I do not get some assistance I shall be obliged to make great sacrifices, all of which you know I would cheerfully make if I could meet the individual who had the cash to meet my necessities. If you do succeed in making any arrangement teleg'ph me at once, as I am on the anxious seat. I note your receipt enclosed for the wine from Meeker. I have never rec'd the wine. Please see Mr. Forquet, and arrange my bill of damages with him, to be submitted to me before settlement.

Y's, respectlly,

GEO. N. SHAW.

VIRGINIA CITY, *Sept'r* 20*th*, 1861.

WM. FREEBORN, esq'r, *San Franc'o.*

30 MY DEAR SIR: I rec'd answer to my telegraph to-day, and availed myself of your priviledge to draw, and valued upon you for four hundred dollars, favor of "Wells, Fargo & Co.," at one day's sight. It did not come one minute too soon, as I was much pressed.

Your letter of the 18th inst. I rec'd this eve'. I note your remarks in relation to Mr. Hearst's interest. You must remember Mr. Stewart examined the whole papers for us, and gave you a clean certificate for my interest and title to the property.

Mr. Hearst one year and a half ago had a contingent interest with me under certain conditions in $\frac{3}{16}$ths of the property, which his agent did not comply with. Nothing was ever put upon record or can in-

terfere with my giving full title to the property. Whatever I have done, has been done with the full consent of his att'y here, Mr. Strong, and his partner, Mr. Jo. Clark. I enclose a few lines from Mr. Clark to satisfy you that what I state is correct. I trust my explanation is satisfactory; if not, I will get Stewart to write you when he returns.

I am very anxious to have the credit, as I cannot get along for the next sixty days without it. I shall dispose of half my interest in the mill and half my interest in the "Davis & Shaw" ground on liberal terms so soon as I can find a customer; of course when that is done I shall relieve the credit. My price is $14,000 for one-half my interest at Mineral Rapids, and 6 feet of the "Davis & Shaw," subject, of course, to $600 p'r foot incumbrance on the ground. Mark cannot do better, if he wishes to go into "Gold Hill," than take hold with me. I note your remarks in regard to bill of damages on the
31 Shearer mill. I write you more fully on that subject in a day or two, when I have consulted Col. Breevort. I thank you for your kind exertions in my behalf. $250 cash was offered yesterday in my presence by a responsible party for one hundred feet of Yellow Jacket.

Yours, respectfully,

GEO. N. SHAW.

VIRGINIA CITY, *N. T.*, *Sept.* 22, '61.

WM. FREEBORN, Esq'r, *San Francisco*

MY DEAR SIR: Your fav'r of the 20th the mo. to Mr. Shaw came safe to hand to-night, and as he is suffering a good deal to-night with his old complaint, "neuralgia," and too unwell to write, he has handed the letter to me to answer.

He desires me to say that he has written you in full in regard to the Hearst matter, (in answer to yours of the 18th;) and he also says that there is nothing in it whatever; that all his business with Mr. Hearst is entirely of a private nature, and that there is not a shadow of a claim against the ditch, except what you and Mark hold. He will, however, I think, be able to write you himself in full to-morrow.

Very respectfully, yours,

IRA A. EATON,
For GEORGE N. SHAW.

VIRGINIA CITY, *Sept.* 22*d*, '61.

WM. FREEBORN, Esq'r., *San Fr'co:*

32 MY DEAR SIR: I requested "Ira" to answer your letter last evening, as I was suffering so with the neuralgia in the arms and could not. I am better now, but not fit to be about. I presume you received my letter, covering Jo. Clark's, in regard to the "Hearst matter." All I can say now, if Mark will not come in and help advance the credit, I wish y'rself and him to come up without delay,

and be prepared to act here at once. If Mark will not come up, get his power to act for him, and you come up yourself. I had rather give you full possession of the property at once than have the work delay'd. I may strike some person yet, but cannot wait until the last moment, particularly as I am not in condition to stave about. Do not neglect to start at once, if you have not sent the credit. I say this to you for your own interest, as I am at the end of my tether at the end of this month. I saw the col., and he thought $1,500 would be ample to allow the "Vulcan," as much of the work I ordered had already been ordered by other parties. I wish to write more, but my arm pains me so I cannot.

Y'rs, resp't.,

GEO. N. SHAW.

P. S.—I am anxiously looking for Stewart; he might help me.

Endorsed: 1st district court. Smith and Dey *vs.* Freeborn and Sheldon. Bill of exceptions.

The defendants then called A. Meyer and Capt. Cheever, and proved by them that Shaw was attempting to borrow money
33 of them on the mill in September, 1861, and was in embarrassed circumstances.

Defendants then, in pursuance of notice, introduced Wm. Freeborn, one of the defendants, who testified that in June last he came to this Territory, and Shaw made application to him and Mark Sheldon to let him have money to build a mill on a mill-site which he owned; we went to the place and saw it, and were pleased with the location. Shaw represented that he could build a 24 stamp-mill, of the description in our agreement, for about $17,000, and he valued his mill-site at about $7,000. He proposed to give us security on the mill and complete it, and deed to us $\frac{5}{10}$ when completed; we then went to Messrs. Stewart & Kirkpatrick and they drew up the instrument, which was executed on the 20th day of June, 1851. On the 29th of the same month went back to San Francisco, and remained there during all the month of July, and returned in August. I visited the mill several times in the month of August; and about the 10th or 11th of September I again returned to San Francisco. I may have had the conversation detailed by Aiken, but I do not recollect all of them. I presume I told him I was interested in the property, for I so considered myself, as mortgagee, having invested my money in it. The conversation detailed by the witnesses Markwell and Orear, as have occurred between me and Markwell, I have no recollection of, and think there must be some mistake, for I never regarded myself as a partner of Geo. N. Shaw, and never so represented my-
34 self. While I was in San Francisco, in Sept., 1861, Shaw sent for Sheldon and myself to come up. We arrived about the 2d of October, and found Shaw unable to proceed with his contract, and proposed that we should let him have money or take the

mill and complete it. We told him we would have nothing to do with it unless provision was made to pay the laborers, and the small debts, for these persons could not afford to wait. It was agreed that we should advance something over $5,000, and that the same should be applied to pay the laborers, and certain other claims, of which I made a memorandum. We then had prepared a deed, which Shaw executed to us, and we gave him an instrument, at the same time allowing him the right of redemption; that neither Smith nor Dey, the plaintiffs, ever applied to me for money on this bill against George N. Shaw & Co. until after the death of G. N. Shaw. Smith and Dey's collector brought me two bills on the 13th of November last, one for the lumber we bought, after we took possession of the mill, which I paid, and one made out to George N. Shaw & Co. He did not ask me to pay the bill against G. N. Shaw & Co.; Smith asked me to pay the bill. Dey spoke to me several times about it. I told him not to sue Shaw; that Shaw would pay it.

The bill which I paid is in the words and figures following:

CARSON CITY, *Nov'r* 11, 1861.

Messrs. Freeborn & Sheldon to Smith and Dey, Dr.

To amount of ac. to date $304 71

Rec'd payment,

SMITH & DEY,
By BROOKS.

35 No demand was ever made on me for the bill against G. N. Shaw & Co. until after the death of Shaw. He further testified, on cross-examination, as to the sale of a mining claim in Gold Hill belonging to Shaw, and the disposition of the proceeds in the payment of Shaw's debts. He further said that he had never held himself out as a partner, but had always stated to the contrary, as he was not a partner.

Mark Sheldon, the defendant, testified that the facts, so far as he was acquainted with them, had been correctly stated by Mr. Freeborn.

He further testified that he looked upon his investment as a loan; never had pretended to any one that he was a partner, and never thought of being one; that he was never called on for the payment of any debts of George N. Shaw & Co. until after his death; and he never knew of the bill of plaintiffs until this suit was brought, except that Mr. Freeborn had told him that they had a bill of this kind.

Defendants then offered the deed and defeasance in evidence, which are as follows:

Deed.

This indenture, made the 4th day of October, A. D. 1861, between George [illegible] of Carson county, Nevada Territory, party of the

first part, and William Freeborn and Mark Sheldon, of the same place, parties of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of ten thousand dollars, lawful money of the United States of America, to him in hand paid by the parties of the second part, the receipt whereof is
36 hereby acknowledged, hath granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, and convey, unto the parties of the second part, their heirs and assigns forever, all of the right, title, and interest of the said party of the first part of, in, and to the following described property, in the following and specified proportions, to wit: To the said William Freeborn fifty-one one hundredths ($\frac{51}{100}$) of said property, and to the said Mark Sheldon forty-nine one hundredths ($\frac{49}{100}$) of the said property; which said property is bounded and described as follows, to wit: All of that certain mill-site, situated and lying in the town of Mineral Rapids, on Carson river, Carson county, Nevada Territory, on the southerly side of said river, together with the mill situated thereon, and all the machinery therein and thereunto belonging, and known as Shaw's mill property, together with the ditch, dam, water, water privilege and power, franchise, and all of the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining; and, also, all of the right, title, interest, estate, demand, claim, and possession of the said party of the first part, as well at law as in equity, of, in, and to said property and every part thereof. To have and to hold the above-mentioned and described premises, and every part thereof, with the appurtenances, unto the said parties of the second part, in the proportions and shares above mentioned, their heirs and assigns forever.

In witness whereof, the said party of the first part hath here-
37 unto set his hand and seal the day and year first above written.

GEO. N. SHAW. [SEAL.]

Sealed and delivered in presence of—
RICHARD RISING.
M. KIRKPATRICK.

TERRITORY OF NEVADA, *County of Carson:*

On this 4th day of October, A. D. 1861, before me, Joseph F. Atwill, a justice of the peace, in and for "Virginia City" precinct, county and Territory aforesaid, personally appeared the within named George N. Shaw, whose name is subscribed to the annexed instrument, as party thereto, personally known to me to be the individual described in and who executed the annexed instrument, and who acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein set forth.

Given under my hand the day and year first above written.

JOSEPH F. ATWILL, *Justice of the Peace,*
Of Virginia City precinct, at the City of Virginia.

Endorsed: Deed. George N. Shaw to William Freeborn and Mark Sheldon, dated October 4th, 1861. Filed for record at 1½ o'clock p. m. 5th October, 1851. Recorded at 2 o'clock p. m. 9th of October, 1861, in vol. 2, page 100, of the Carson county records.

SAM. D. KING,
Recorder Carson County.

38 *Defeasance.*

This agreement, made the 4th day of October, A. D. 1861, between William Freeborn and Mark Sheldon, of Carson county, Nevada Territory, parties of the first part, and George N. Shaw, of the same place, party of the second part, witnesseth:

Whereas the said George N. Shaw, party of the second part, by deed bearing even date herewith, has conveyed to the said parties of the first part all of the mill-site, with the mill and machinery thereon, situated thereon, and known as "Shaw's mill property," with the ditch, dam, water, water privileges and power, franchise, tenements, hereditaments, and appurtenances thereto belonging, or in anywise appertaining, situated in the town of Mineral Rapids, on Carson river, said county and Territory, as by reference to said deed will more fully appear, to them in the following proportions and shares: to the said William Freeborn $\frac{51}{100}$ thereof; to said Mark Sheldon $\frac{49}{100}$ thereof; and whereas the said party of the second part being unable and incapable of completing the said mill, the said parties of the first part have agreed to advance and furnish all of the money and means necessary to complete and finish the said mill, and to have the said mill completed and in good working and running order and condition within a reasonable time from the date hereof:

Now, therefore, the said parties of the first part hereby covenant, promise, and agree to and with the said party of the second part, his heirs and assigns, that if the said party of the second part, his heirs and assigns, shall well and truly pay to the said parties of the first part any and all sum and sums of money paid, advanced, laid
39 out, or expended by the said parties of the first part from and after this date, whether in payment of existing indebtedness and liabilities contracted by the said party of the second part, on account of the building and erection of said mill or improvements of said property, and any and all money paid and advanced, laid out or expended by the said parties of the first part, in completing said mill and putting the same in good working and running order and condition, and improvement of said property hereafter, together with interest on each, all, and every expenditure from and after the date of such expenditure until the time of payment, at the rate of three per cent. per month, and every part and portion of such advancements and expenditures, within six (6) months from the date of this agreement, then and in that event the said parties of the first part will reconvey to the said party of the second part, or his assigns, the said property above described, to the following extent, proportion,

and shares: The said Wm. Freeborn will reconvey to said George N. Shaw twenty-five one hundredths ($\frac{25}{100}$) of said property; the said Mark Sheldon will reconvey to the said George N. Shaw twenty-four one hundredths ($\frac{24}{100}$) of said property. But if the said party of the second part shall fail or neglect within said period of six months to well and truly pay to the said parties of the first part all and every part of the said money, advancements, and expenditures, with the said interest thereon, as hereinbefore specified and mentioned, then and in that event this agreement to become and be absolutely null and void. The said parties of the first part hereby further covenant, promise, and agree to and with the said party of the second part, and his assigns, that forty-nine one hundredths
40 ($\frac{49}{100}$) of the nett proceeds arising from the running and working of said mill within said period of six (6) months, shall be credited to the said party of the second part, and be applied in the reduction of the sum or sums so to be repaid by the said party of the second part to the parties of the first part, as hereinbefore provided. The said parties of the first part hereby further covenant, promise, and agree to and with the said party of the second part, that if the said party of the second part shall well, truly, and fully comply with the agreements herein contained, and repay to the said parties of the first part, within said period of six months, all of the said advancements and expenditures, with the said interest made by them as hereinafter particularly mentioned and specified, then and in that event the said parties of the first part, upon said repayment to them as provided to be done, that the whole nett proceeds of the said mill shall be applied continuously to the payment of the said party of the second part of the sum of five thousand dollars ($5,000 00) until said sum shall be paid.

In witness whereof, the said parties of the first part have hereunto set their hands and seals, the day and year first above written.

WM. FREEBORN. [SEAL.]
MARK SHELDON. [SEAL.]

Sealed and delivered in presence of—
RICHARD RISING.

Endorsed: Agreement. William Freeborn and Mark Sheldon to George N. Shaw. Dated October 4th, 1861.

41 Defendants then rested.

Plaintiffs then, in rebuttal, called Jonas S. Aiken, who said he was present at the time of the making of the contract with Orear on the race, and heard the conversation testified in regard to by the witnesses Orear and Jones; that Orear asked Jones who were the partners of George N. Shaw & Co., and that Jones said that Freeborn and Sheldon were interested, and he did not know of any one else.

Plaintiffs then closed.

Instructions of the court.

After the argument of the cause, the court then, in giving the instructions asked by defendants, refused the following:

George N. Shaw bargains, sells, and conveys to Freeborn and Sheldon, the defendants, certain town-lots in the town of "Mineral Rapids," and also his interest in a water-privilege on Carson river, appurtenant to the land embraced in these lots.

"This conveyance" (in the language of their agreement) "is intended as a mortgage, and is subject to the following contract and conditions:"

Shaw further agrees to construct on the premises sold a substantial twenty-four stam quartz-mill, to be propelled by water, the privilege of which is described in the contract, and to construct a dam and race, so as to apply the water to the propulsion of the mill. The mill to contain all the improvements and appurtenances necessary
42 to make it a first-class mill. All the costs and expenses of these improvements to be paid by Shaw; and the entire work was to be completed before the 1st day of January, 1862. Upon the completion of this work by Shaw at the time specified, he was to convey to these defendants $\frac{51}{100}$ of all the property, as a consideration for the sum of $12,000, which was previously to be advanced by def'dts to Shaw—$3,000 on the 1st of June, (the date of the agreement,) $4,000 on the 31st July, and $5,000 on the 31st day of August, 1861.

But if Shaw failed to complete the work within the time specified in the contract, and to convey to def'ts the $51\frac{100}{100}$, then they were to have the right to enter upon and take possession of all the property, and hold it without any further conveyance.

This is a statement of the main features of the original contract between the defendants and Geo. N. Shaw.

It is unimportant, so far as this case is concerned, whether this instrument of writing is in fact a mortgage or not; but it would seem clearly to be a mortgage according to the very definition read by counsel to show that it was not a mortgage. It is true that this instrument of writing was not given to secure the repayment of money; it was given to secure the performance of the conditions of Shaw's covenant—a compliance on his part of his contract with the defendants.

Three months before the time had expired in which Shaw was to complete the work he became embarrassed, and had contracted debts to a large amount for labor employed and materials furnished in the construction of the mill, dam, race, &c.

43 Under these circumstances Shaw called upon these defendants for assistance. They came forward on the 4th day of October and took from Shaw a conveyance of the entire property, with a condition of defeasance providing that when Shaw should pay to defendants the amount advanced by them on the property, and for work upon it and materials furnished, and the amount subsequently to be advanced by them in the completion of the mill, together with the interest on these sums, defendants were to reconvey to Shaw $\frac{49}{100}$

of the property. The business of constructing the mill, dam, race, &c., was conducted by Shaw in the name of George N. Shaw & Co.

The defendants are now, and have been since the 4th day of October, in the possession of all the property mentioned in the first conveyance of Shaw to defendants, together with the improvements since made upon it by Shaw, and for which the indebtedness sued upon in this action was contracted.

Upon this state of facts, which seem not to be controverted, depends the liability of the defendants, if they are liable at all, in this action.

The liability of the defendants in this suit must depend upon one or both of the two following propositions:

1st. Were the defendants partners in fact, as between themselves, with Geo. N. Shaw & Co. at the time this debt was contracted; or,

2d, Did they hold themselves out to the world as partners, or were their acts and conduct in relation to the building of the mill, &c., of such a character as to create a partnership between them as to third persons.

44 Whether the defendants were partners of Geo. N. Shaw, as among themselves, depends upon the construction of the written contract between the parties. And this is a question for the determination of the court. This is a question of intention among the parties themselves, and so far as they alone are concerned must be gathered from the language of their contract; and this language must receive its interpretation and construction by the court.

From the terms of their contract it would seem clear that the defendants had no intention of becoming the partners of George N. Shaw at the date of their agreement, or at any time subsequently and before the completion of the mill, &c., by Shaw.

They may have intended, and probably did intend, to form a partnership with Shaw after this work was completed, but it is hardly necessary to say that such intention is not sufficient to charge the defendants in this suit.

A much more difficult and important question is contained in the second proposition before stated, and this question it is your province alone to decide.

Admitting that the defendants and Shaw were not and did not intend to be partners, as between themselves, yet they may have conducted their business, or suffered it to be conducted by Shaw in such a manner as to render them liable to third persons. This, in the opinion of the court, is the point upon which this case must turn. If you believe from the testimony, from the manner of conducting their business on the part of these defendants, or allowing it to be conducted in the firm name of George N. Shaw & Co., and from all the other

45 testimony in the case, that the defendants held themselves out to the public as partners, or knowingly and without denial or contradiction *allowed* Shaw to represent them as his partners, they are responsible as partners to third persons.

Was the business of constructing the mill, &c., conducted in such a manner, and with the knowledge of the defendants, as to induce

prudent men to believe that they were partners of George N. Shaw, or members of the firm of George N. Shaw & Co. ?

If you believe that the business was so conducted the defendants are clearly liable to third persons who dealt with the firm of George N. Shaw & Co. under that belief.

Judging from the acts and conduct of these deft's, as shown by the testimony, and from all the facts in the case, if you believe that third persons were induced to believe that defendants were members of the firm of Geo. N. Shaw & Co., and so trusted them, they are liable to all persons who thus trusted or gave credit to the firm.

The defendants are in possession of all the property for the improvement of which this debt was contracted, and if these plaintiffs trusted George N. Shaw & Co. under the reasonable belief, based upon the acts and conduct of the defendants, that they were partners of Shaw, or members of the firm of George N. Shaw & Co., it is peculiarly fit and proper that they should be held responsible in this case. If you believe, from all the testimony, that the acts and conduct of these defendants were of such a character as to lead reasonable and prudent men to the belief that they were members of the firm
46 of George N. Shaw & Co., or partners of George N. Shaw, and that these plaintiffs furnished the lumber, which is the subject-matter of this action, under such belief, you will find for the plaintiffs; if not, you will find for the defendants. There is no dispute as to the amount of plantiffs' claim; it is admitted to be as alleged in the complaint.

Endorsed: Instruction of the court.

Instructions granted.

1st. To render the defendants responsible, as partners of George N. Shaw, it is necessary that they should have been the actual partners of said Shaw, or that they should have engaged in business with him under an agreement to divide the *profits* of such business, as *profits*, or that they should have held themselves out to the world as such partners.

2d. An agreement between the defendants and the deceased, George N. Shaw, by which they undertake to advance a sum of money to said Shaw, and he undertakes to erect a mill by a certain date; and also agrees that, when such mill shall be completed, he will convey to them $\frac{51}{100}$ of such mill, instead of the sum of money advanced by them to him, did not constitute them partners of said Shaw, either as between themselves and said Shaw, or as between themselves and the public.

47 3d. The instrument executed by and between Geo. N. Shaw and the defendants, Freeborn and Sheldon, dated June 20th, 1861, and introduced in evidence, did not constitute the defendants and the said George N. Shaw partners.

4th. The jury are instructed that, unless an actual partnership be proved to have existed between the defendants and the deceased, George N. Shaw, then said defendants can only be liable because

they have held themselves out to the world as such, or have by their conduct, acts, or declarations, induced others to give credit to George N. Shaw.

5th. If the defendants and George N. Shaw were not partners, as between themselves, then they could only become liable to the creditors of George N. Shaw, as partners, by holding themselves out to the world as such, thereby inducing others to give credit to the said George N. Shaw upon the faith of being paid by defendants.

6th. In order to charge the defendants as partners of George N. Shaw, deceased, the plaintiffs must prove to the satisfaction of the jury that they were either partners, or held themselves out to the public, or to the plaintiffs, as partners at the time the debt owing to plaintiffs was contracted.

8TH DISTRICT COURT, 1ST DISTRICT,
Storey County:

SMITH & DEY
vs.
FREEBORN and SHELDON.

48 Defendants ask the court to charge the jury that it is not essential to the existence or validity of a mortage that the debt should be secured to be paid in money. The parties contracting might provide that it should be extinguished by a conveyance of land or other property; and if you believe, from the evidence, that the money advanced by Freeborn and Sheldon to Shaw to build the mill was to be paid by a conveyance of part of the property, this fact did not constitute them partners, either as between themselves or as to third parties.

Endorsed: Instructions asked by defendants and given by the court.

Verdict of the jury.

We, the jurors in the case, wherein Smith & Dey is plaintiffs, and Freeborn & Sheldon defendants, do find for the plaintiffs for the amount claimed, three thousand seven hundred and eighty-five dollars and twenty-four cents, ($3,785 24.)

Justus Knox, foreman; John Brickell, S. H. Wattenburger, A. J. Gould, Hiram S. Falor, James D. Meagher, John Lent, Chas. S. Coover, Jeremiah Harbnett, W. H. Burrall, S. M. Collins.

Endorsed: Smith & Dey *vs.* Freeborn *et al.* Verdict filed May 9th, A. D. 1862.

D. M. HANSOM, *Clk.*

49 *Judgment.*

In the district court, 1st judicial district, Storey county, Nevada Territory. May term, A. D. 1862.

H. MARTIN SMITH and RICHARD V. DEY
vs.
WILLIAM FREEBORN and MARK SHELDON.

This action having been duly tried by a jury duly empannelled and sworn, and the said jury having on this 9th day of May, A. D. 1862, rendered a verdict for the plaintiffs, and against the defendants, for the sum of three thousand seven hundred and eighty-five $\frac{24}{100}$ dollars, and the said verdict having been duly recorded, it is therefore by the court here ordered and adjudged, that the above plaintiffs, H. Martin Smith and Richard V. Dey, do have and recover judgment of, from, and against the above defendants, William Freeborn and Mark Sheldon, in the sum of three thousand seven hundred and eighty-five $\frac{24}{100}$ dollars, to bear interest from this date at the rate of ten per cent. per annum, together with their costs and disbursements in said action, taxed at the sum of one hundred and ninety-three $\frac{65}{100}$ dollars and accruing costs, and that execution issue therefor.

Rendered May 9th, 1862.

GORDON N. MOTT.
District Judge first Judicial District.

Endorsed: In the district court 1st judicial district, H. Martin Smith and Richard V. Dey *vs.* William Freeborn and Mark Sheldon. Judgment.

STEWART, KIRKPATRICK & RISING,
& JOHN R. McCONNELL,
Att'ys for Defendants.

50 *Motion for new trial.*

Now come the said defendants and move the court to set aside and vacate the verdict and judgment rendered in said action, and to grant the defendants a new trial of said action; and in support of said motion and the foregoing statement, the defendants assign the following grounds:

1st. That the verdict and judgment is against law.

2d. Insufficiency of the evidence to justify the verdict and judgment.

3d. Error in law accruing at the trial and excepted by the defendants.

STEWART, KIRKPATRICK & RISING,
& JNO. R. McCONNELL,
Att'ys for Def'ts.

The foregoing statement on motion for new trial is hereby settled according to the interlineations in the same made in red ink as a statement on motion for a new trial of said cause, and contains all of

the evidence and exceptions of the respective ———, hereto, upon said trial.

GORDON N. MOTT,
Judge 1st District.

MAY 16TH, 1862.

Endorsed: 1st district court. Smith and Dey *vs.* Freeborn and Sheldon. Statement on motion for new trial. Due service admitted of a copy May 13, 1862.

SMITH, CLAYTON & LINDSEY,
Att'ys for Plaintiffs.

Filed May 12th, 1862.

D. M. HANSOM, *Clk.*

51 The motion for a new trial came up regularly before the court upon the said statement, pleadings, &c., and was argued and submitted, and afterwards the court overruled the said motion for a new trial, and entered the following order on the minutes of the court.

Order overruling motion for new trial.

SMITH & DEY
vs.
FREEBORN & SHELDON.

Ordered, that the motion for a new trial in this case, heretofore submitted, be, and the same is hereby, overruled.

GORDON N. MOTT,
District Judge 1st District.

To which ruling and order of the court the said defendants then and there duly excepted.

Undertaking on writ of error.

District court, 1st judicial district, Nevada Territory, county of Storey.

WM. FREEBORN and MARK SHELDON
vs.
J. MARTIN SMITH and RICHARD DEY.
} Judgment at the May term, 1862.

We promise to pay all costs that may be awarded against Mark Sheldon and Wm. Freeborn, on their writ of error in this cause, and also the judgment rendered in this cause with the costs therein if affirmed, and the damages, or any new or modified judgment
52 that may be given against them.

Dated at Virginia City, May 23d, A. D. 1862.

WM. FREEBORN.
MARK SHELDON.
A. MEYER.
WM. H. GRAVES.

COUNTY OF STOREY, *ss:*

A. Meyer and William H. Graves, the sureties to foregoing undertaking, each being duly sworn, deposes and says, that he is a householder in the said county, and that he is worth the sum of eight thousand dollars over and above all his debts and liabilities, exclusive of property exempt from execution.

WM. H. GRAVES.
A. MEYER.

Subscribed and sworn to before me this 23d day of May, 1862.
J. W. NOYES,
Justice of the Peace, Virginia Precinct.

Endorsed: District court, Freeborn and Sheldon *vs.* Smith & Dey. Undertaking, writ of error. Filed May 23d, 1862.
D. M. HANSON, *Cl'k,*
By CHAS. RAWSON, *D'p'y.*

Notice of writ of error.

NEVADA TERRITORY,
County of Storey, ss:

To J. Martin Smith and Richard Dey, or, Mess. Smith, Clayton & Lindsay, your att'ys of record:

53 You are hereby notified that Wm. Freeborn and Mark Sheldon have sued out a writ of error from the supreme court of said Territory, to reverse the decision of the district court of said county given in your favor against the said Wm. Freeborn and Mark Sheldon, at the May term of 1862, and the order of said district court overruling the motion for a new trial of said action; and unless you appear in the said supreme court on the first Monday of June, 1862, the cause will be heard in your absence.

Witness the seal of the district court of the 1st judicial district, said county, the 24th day of May, A. D. 1862.

[SEAL.]
D. M. HANSON,
Clerk 1st D. C.

Certificate of clerk of district court.

TERRITORY OF NEVADA,
County of Storey, ss:

H. MARTIN SMITH and RICHARD V. DEY, plaintiffs,
vs.
WILLIAM FREEBORN and MARK SHELDON, defendants.

CLERK'S OFFICE OF THE DISTRICT COURT OF THE 1ST JUDICIAL DISTRICT.

I, David M. Hanson, clerk of the district court of the first judicial district, do hereby certify that the foregoing complaint, answer,
54 judgment, settled statement, and notice of appeal are true and correct copies of the original papers in my office, and of the order overruling motion for a new trial, entered in the minutes of said

court, and that the same constitute the transcript on appeal from the judgment made and entered May 9th, A. D. 1862, in favor of said plaintiffs and against said defendants.

I do further certify that the undertaking on appeal has been duly filed according to law, and further that defendant's instructions refused by the court cannot, after diligent search, be found.

In witness whereof, I have hereunto set my hand and seal of said district court of the first judicial district, in the Territory of Nevada, this 12th day of June, A. D. 1862.

[SEAL.]

DAVID M. HANSON.

Judgment of supreme court.

55 Be it remembered that on the 21st day of June, A. D. 1862, at a regular term of the supreme court of Nevada Territory, among other proceedings, the following was had, to wit:

SMITH & DEY, respondents,
vs.
FREEBORN & SHELDON, appellants.

On appeal from the district court, 1st judicial district, in and for Storey county.

This cause being on this day called, and having been heretofore argued and submitted, and taken under advisement by the court, and all and singular the law and premises being by the court seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Turner, C. J.—full bench concurring—to the effect that the judgment of the court below be affirmed. Whereupon it is now considered, ordered, adjudged, and decreed by the court here, that the judgment of the district court of the first judicial district, in and for Storey county, in the above-entitled cause, be, and the same is hereby, affirmed with costs.

GEORGE TURNER, *C. J.*
GORDON N. MOTT,
H. M. JONES, *Associates.*

56 *Affidavit of amount in controversy.*

UNITED STATES OF AMERICA:

In the Supreme Court of the United States, December term, A. D. 1862.

WILLIAM FREEBORN & MARK SHELDON, plaintiffs in error,
vs.
H. MARTIN SMITH & RICHARD V. DEY, defendants in error.

William M. Stewart, being duly sworn, deposes and says, that he was of counsel for the plaintiffs in error in the supreme court of the

Territory of Nevada, and makes this affidavit for and on behalf of the said William Freeborn and Mark Sheldon, plaintiffs in error. And deponent further deposes and says that the amount in controversy exceeds one thousand dollars in the above-entitled action. And further deponent saith not.

WM. M. STEWART.

Sworn to and subscribed before me this 23d day of June, A. D. 1862.

GEO. TURNER,
Chief Justice of Nevada.

Endorsed: Affidavit of amount in controversy. Filed June 23d, 1862.
J. McC. REARDON, *Clerk.*

57 *Writ of error to U. S. Supreme Court.*

TERRITORY OF NEVADA:

WILLIAM FREEBORN and MARK SHELDON, pl'ffs in error, *vs.* H. MARTIN SMITH and RICHARD V. DEY, def'ts in error. } Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court holden at Carson City in and for the Territory of Nevada, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, or some of you, between William Freeborn and Mark Sheldon, plaintiffs in error, and H. Martin Smith and Rich'd V. Dey, defendants in error, in a civil action to recover three thousand seven hundred and eighty-five dollars $\frac{24}{100}$ debt, and costs taxed in the court below at one hundred and ninety-three $\frac{65}{100}$ dollars, together with costs in the said supreme court of the Territory of Nevada taxed at sixty-one dollars, a manifest error has intervened, to the great damage of the said William Freeborn and Mark Sheldon, the said plaintiffs in error, as in their complaint has been stated; and it is just and proper that the error, if any there be,
58 should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States on the first Monday of December next, at Washington, being the seat of the national government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the honorable Roger B. Taney, esquire, chief justice of the said Supreme Court, at Washington aforesaid, the twenty-third day of June, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-sixth.

[SEAL.]

J. McC. REARDON,
Clerk of the Supreme Court of Nevada Territory.

Endorsed: Writ of error. Filed June 23d, A. D. 1862.
J. McC. REARDON,
Clerk of the Supreme Court of Nevada Terr.

59 *Petition for citation.*

TERRITORY OF NEVADA:

WILLIAM FREEBORN and MARK SHELDON, pl'ffs in error,
vs.
H. MARTIN SMITH & RICHARD V. DEY, def'ts in error.

To the Hon. George Turner, chief justice of the supreme court of the Territory of Nevada:

The petition of William Freeborn and Mark Sheldon, plaintiffs in error in the above-entitled cause, respectfully represent, that on, to wit: the 9th day of May, A. D. 1862, at a term of the district court in and for the county of Storey, in the Territory of Nevada, begun and holden on the — day of May, A. D. 1862, a judgment was rendered by said district court against your petitioners, and in favor of the defendants in error, H. Martin Smith and Richard V. Dey, for the recovery by said defendants in error of and from your petitioners of the sum of "three thousand seven hundred and eighty-five $\frac{24}{100}$ dollars, with interest thereon at the rate of ten per cent. per annum debt, together with the costs of suit of said defendants in error in that behalf expended, taxed at the sum of one hundred and ninety-three $\frac{65}{100}$ dollars;" that thereupon your petitioners, plaintiffs in error, sued out a writ of error to the June term of the supreme court

60 of the said Territory of Nevada, begun and holden at Carson City on the 2d day of June, A. D. 1862, for the reversal of said judgment, and that afterwards, to wit: on the 21st day of June, 1862, at the said June term of said court, the said supreme court gave and rendered judgment in said cause affirming the said judgment of the said district court, with costs, taxed at the sum of sixty-one dollars.

Your petitioners further represent that they have sued out a writ of error to the Supreme Court of the United States for the reversal of the judgment of the said supreme court of the said Territory, and that they have taken the steps necessary to remove the record and proceedings in said cause to the said Supreme Court of the United States at the term of said court to be begun and holden on the first Monday of December, A. D. 1862.

Wherefore, in consideration of the premises, your petitioners pray your honor, 1st, that a citation be issued by your honor to the said defendants in error, in manner and form provided by law; and 2d, that your honor approve the bond presented by the plaintiffs in error, as required by the statute in such cases made and provided.

As in duty bound, your petitioners will ever pray, &c.

J. R. McCONNELL & WM. M. STEWART,
Of counsel for Plaintiffs in Error.

61 Endorsed: Petition for citation. Filed June 23d, A. D. 1862.
J. McC. REARDON,
Clerk of the Supreme Court, Nevada Terr.

Assignment of errors.

United States of America, Supreme Court, December term, A. D. 1862.

WILLIAM FREEBORN and MARK SHELDON, pl'ffs in error,
vs.
H. MARTIN SMITH and RICHARD V. DEY, def'ts in error.

Afterwards, to wit, on first Monday of December, A. D. 1862, at the December term of said Supreme Court before the chief justice and associate justices of the same, at the city of Washington, in the District of Columbia, came the said William Freeborn and Mark Sheldon, by their attorneys, and say, that in the record and proceedings in said cause, and also in giving the judgment therein, there is a manifest error in this, to wit: That it appears from the said record that the said supreme court of said Territory refused to reverse the
62 judgment and the order of the district court in and for the 1st judicial district of said Territory refused a new trial of the issues in said cause. Whereas by the law of the land, the said supreme court ought to have reversed the said judgment and order of the said district court, and ought to have remanded the said cause back to the said district court for a new trial of the said issues of fact. Because—

1st. The verdict of the jury in said district court and the judgment of the court thereon were contrary to law.

2d. Said verdict was against evidence.

3d. There was no proof before the said district court and the said jury that the plaintiffs in error and George N. Shaw, deceased, were, or at any time had been, partners as between themselves.

4th. There was no proof before said district court and jury that plaintiffs in error and the said George N. Shaw, deceased, were at any time, and particularly at the time at which the alleged debt or demand of the defendants in error was contracted, interested jointly or together in any business whatever, in the profits whereof plaintiffs in error were interested.

5th. It was shown affirmatively to said district court and jury, that the only relation existing between the said George N. Shaw, deceased, and the said plaintiffs in error, was that of mortgagor and mortgagee

63 6th. There was no evidence whatever before the said district court and jury that the said plaintiffs in error, or either of them, ever at any time, and particularly at the time at which the alleged debt or demand of defendants in error was contracted, held themselves or himself out to the world in any manner as partners with the said George N. Shaw, deceased.

7th. There was particularly no evidence before the said district court and jury that the plaintiff in error, Mark Sheldon, ever held himself out to the world or to the community as a partner of George N. Shaw, deceased.

8th. There was no evidence before the said district court and jury that the plaintiffs in error, William Freeborn and Mark Sheldon, were ever partners as between themselves, or that they were ever jointly interested or associated together in any business, or that they or either of them ever held themselves or himself out to the world as partners.

9th. There was no evidence before the said district court and jury that the plaintiffs in error, or either of them, ever held themselves or himself out to the said defendants in error as partners with George N. Shaw, deceased, or that said defendants in error were induced to give credit to said George N. Shaw, by means of any representations of said plaintiffs in error, or either of them.

10th. It was made to appear affirmatively to said district court and jury that the said defendants in error gave credit to George
64 N. Shaw alone, in respect to the matters from which said alleged indebtedness accrued, and not to said Shaw, jointly with plaintiffs in error.

There is error also in this, to wit: That the said supreme court of the said Territory of Nevada refused to reverse the judgment of the said district court and remand the cause back for further proceedings, because of the exclusion by said district court at the trial of said cause of the correspondence (consisting of telegrams and letters numbering from 1 to 12 inclusive) between the plaintiff in error, William Freeborn, and the deceased George N. Shaw, such correspondence tending to explain the actual relations subsisting between the said Freeborn and the said Shaw at the time the alleged indebtedness to the said defendants in error was contracted.

There is error also in this, to wit: That the said supreme court of the said Territory of Nevada refused to reverse the said judgment of the said district court, because of the error of said district court in instructing the jury that the mortgage executed on the 20th day of June, A. D. 1861, by George N. Shaw, as mortgagor, and the plaintiffs in error, as mortagees, was of no importance to the decision of determination of said cause.

There is error also in this: Whereas it appears from the said record and proceedings that the judgment of the said district court ought have been reversed, and a judgment ought by the law of the land to
65 have been given for the plaintiffs in error, or the cause remanded to the said district court for other and further proceedings, yet the said judgment was in fact by the said supreme court of the

said Territory affirmed, and a new trial of the issues in said cause refused.

Wherefore the said William Freeborn and the said Mark Sheldon, plaintiffs in error, aforesaid, pray that judgment of affirmance of judgment and order of the district court aforesaid, for the errors aforesaid, and for other errors in the said record and proceedings appearing, may be reversed, annulled, and altogether held for nothing; and that they may be restored to all things which they have lost by occasion of the said judgment and order of the said district court, and of the said judgment of affirmance of the said supreme court of the Territory of Nevada.

J. R. McCONNELL & WM. M. STEWART,
Of Counsel for Plaintiffs in Error.

Endorsed: Assignment of errors. Filed June 23d, A. D. 1862.
J. McC. REARDON,
Clerk of the Supreme Court of Nevada Territory.

66 *Bond on appeal to U. S. Supreme Court.*

Supreme court of the Territory of Nevada, June term, A. D. 1862.

Know all men by these presents, that we, William Freeborn and Mark Sheldon, as principals, and Abraham Meyer and Wm. H. Graves, as sureties, are held and firmly bound unto H. Martin Smith and Richard V. Dey, in the sum of eight thousand two hundred dollars, to be paid to the said H. Martin Smith and Richard V. Dey, their executors and administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 23d day of June, A. D. 1862.

The condition of this obligation is such, that whereas the said H. Martin Smith and Richard V. Dey have recovered a judgment in the supreme court of the Territory of Nevada, at the June term, A. D. 1862, against the said William Freeborn and Mark Sheldon, for the sum of three thousand seven hundred and eighty-five $\frac{24}{100}$ dollars damages, and costs of the district court taxed at one hundred and ninety-three $\frac{65}{100}$ dollars, and costs of the said supreme court taxed at sixty-one $\frac{40}{100}$ dollars;

And whereas the said William Freeborn and Mark Sheldon, in order to obtain a reversal of the same, have sued out a writ of error to the Supreme Court of the United States:

Now, therefore, if the above-named William Freeborn and Mark Sheldon shall prosecute said writ of error to effect, and shall
67 answer all damages and costs and pay the said judgment if they shall fail to make good their plea, then this obligation shall be void; otherwise, the same shall remain in full force and virtue.

WM. FREEBORN. [SEAL.]
MARK SHELDON. [SEAL.]
WM. H. GRAVES. [SEAL.]
A. MEYER. [SEAL.]

Executed and delivered in presence of—

TERRITORY OF NEVADA,
County of Storey, ss:

Abraham Meyer and Wm. H. Graves, the sureties to the foregoing bond, being duly sworn, each for himself, deposes and says, that he is a resident of said county and a householder therein, that he is worth double the amount specified in said bond as the penalty thereof, over and above his just debts and liabilities, exclusive of property exempt from execution.

WM. H. GRAVES.
A. MEYER.

Subscribed and sworn to before me this 23d day of June, A. D. 1862.

GEO. TURNER,
Chief Justice Supreme Court, Nevada Territory.

Endorsed: Supreme court. H. Martin Smith et al. *vs.* Wm. Freeborn et al. Bond on writ of error, Supreme Court U. S.

I have examined the sureties to the within bond, and am satisfied with their sufficiency, and the within bond is hereby approved June 23d, A. D. 1862.

GEO. TURNER,
Chief Justice of the Supreme Court of Nevada Territory.

Filed June 23d, A. D. 1862.

J. McC. REARDAN, *Clerk.*

68 *Citation.*

TERRITORY OF NEVADA:

WILLIAM FREEBORN and MARK SHELDON, pl'ffs in error,
vs.
H. MARTIN SMITH and RICHARD V. DEY, def'ts in error.

United States of America, ss., to H. Martin Smith and Richard V. Dey, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Nevada, wherein William Freeborn and Mark Sheldon are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable George Turner, chief justice of the supreme court of the Territory of Nevada this the 23d day of June, in the year of our Lord one thousand eight hundred and sixty-two.

GEORGE TURNER,
Chief Justice of Supreme Court of Nevada Territory.

69 Received the within citation this 23d day of June, A. D. 1862.

TERRITORY OF NEVADA,
County of Ormsby:

Served personally on H. Martin Smith and Richard V. Dey, the within-named defendants, at Carson City, county and Territory aforesaid, by delivering to them a true copy of the within citation and by reading this original to them this 26th day of June, A. D. 1862, at 9 o'clock a. m.

D. J. GASHERIE, *Sheriff*,
By PHILIP STONER, *Under Sh'ff.*

Endorsed: Filed June 25, 1862.

J. McC. REARDAN, *Clerk.*

70 *Certificate of clerk.*

UNITED STATES OF AMERICA,
Territory of Nevada, ss:

H. MARTIN SMITH and RICHARD V. DEY, plaintiffs.
vs.
WILLIAM FREEBORN and MARK SHELDON, defendants.
} Supreme Court, Nevada Territory.

I, James McC. Reardan, clerk of the supreme court of Nevada Territory, do hereby certify that the foregoing is a true and correct copy of the record from the district court of the 1st judicial district in and for Storey county, said Territory, to said supreme court, and of the judgment of said supreme court, affidavit of amount in controversy, writ of error to United States Supreme Court, petition for citation, assignment of error, bond on appeal and citation in the above entited cause, as the same now remain on file, of record in my office.

Given under my hand and the seal of our said supreme court, affixed at my office in Carson City, capital of said Territory, this 18th day of September, A. D. 1862.
[SEAL.]

J. McC. REARDAN, *Clerk.*

Supreme Court of the United States.

DECEMBER TERM, 1863.

No. 188.

FREEBORN ET AL.

vs.

SMITH ET AL.

BRIEF OF PLAINTIFFS IN ERROR.

Smith *et al.* sued Freeborn *et al.* in the First District Court of Nevada Territory, to recover the sum of $3,785 24 and interest, the value of certain lumber and other building materials, which they had furnished to one George N. Shaw, and which were used by him in the erection of a quartz-mill. The whole value of the materials so furnished, was upwards of $5,000; but Shaw, had made several payments on account.

Rec. p. 1.

Shaw, had chosen, for purposes of his own, to use the name and style of "George N. Shaw & Co."

Shaw died insolvent and to the plaintiffs below it became important to saddle their unpaid claim (no doubt justly due to them from *somebody*) on *anybody* that could be brought, directly or indirectly, under the na me of "George N. Shaw & Co."

Accordingly they brought their suit against William Free-

born and Mark Sheldon, (these plaintiffs in error,) charging that they were surviving partners of George N. Shaw, and had traded jointly with him, under the firm name of "Geo. N. Shaw & Co."

The substance of the case is this question, to-wit:

Is it shown upon the record that William Freeborn AND *Mark Sheldon were partners, in respect of that quartz mill with George N. Shaw, at the time of the purchase of these materials for that building?*

If there was this partnership between these *three* persons, (not between any *two* of them,) then it is conceded that the verdict and judgment below were right *so far as this point is in question.*

If there was evidence tending to show that such a partnership existed when Shaw contracted this debt, in respect of the business for which the debt was contracted, it is of course conceded that whether such evidence was light or conclusive, it was for the jury to settle that question definitively.

But our objection is on this point, that there was absolutely *no* evidence *tending* to show that such a partnership existed. The Court ought not to have submitted to the jury the question of fact whether such partnership existed.

The only ground upon which the plaintiffs below assumed to charge the defendants as "*surviving partners*" was, in effect, that they were interested directly in the success of Shaw's enterprise.

But they were only interested as money-lenders to Shaw, secured by a mortgage.

Rec., pp. 8, 9.

It is plain that this instrument does not tend to show such partnership.

The *parol* evidence does not in any degree affect Freeborn. He stands clear of it all. There is no *scintilla* of proof as to him.

It follows that if the Court can correct the error below, upon the record, the judgment must be reversed. Because it is familiar law that where there has been judgment against *two* (jointly) and there is error as to *one*, the judgment must be reversed.

If this Court should think it necessary to cite authorities in any opinion on this point, the following are suggested to the recollection of the Court:

Bac. Ab., Error M.
12 John. R., 434.
14 *Id.*, 417.

The remaining point arises upon the rejection of certain evidence offered by the defendants, to wit: letters and telegraphic messages from Shaw (the real debtor) to the parties charged as partners in this suit, and now plaintiffs in error.

Upon this question the authorities are cited, and the principle plainly deduced, in 1 Greenleaf on Ev., sec. 147.

It is submitted that the court below erred, and that the judgment ought to be reversed.

J. M. CARLISLE,
For plaintiffs in error.

Supreme Court of the United States.

DECEMBER TERM, 1864.

No. 75.

FREEBORN & SHELDON, PLAINTIFFS IN ERROR,

against

SMITH & DEY, DEFENDANTS IN ERROR.

Supplementary Brief for the Plaintiffs in Error.

On February 27, 1865, Congress passed "An act providing for a District and Circuit Court of the United States for the district of Nevada, and for other purposes." The 8th section of this act provides "that all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States, upon any record from the Supreme Court of the Territory of Nevada may be heard and determined by the Supreme Court of the United States; and the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the District Court of the United States for the district of Nevada, or to the Supreme Court of the State of Nevada, as the nature of the said appeal or writ of error may require, and each of these Courts shall be the successor of the Supreme Court of Nevada Territory as to all such cases, with full power to hear and determine the same, and to award mesne or final process thereon."

I.

The first branch of this act was passed to obviate a doubt which has arisen upon certain decisions in this court, which do not seem reconcilable.

The act admitting Wisconsin as a State, (*Statutes at Large*, 233,) made no provision for appeals or writs of error on de-

crees or judgments of the territorial court then pending in this court. In *McNulty vs. Batty*, 10 *Howard*, 77, this court dismissed such a writ of error, apparently acting on the idea that upon the extinction of the territorial government and of the territorial courts, the appellate jurisdiction of this court was also extinguished. This latter conclusion was merely implied; for nothing of the kind was expressed in the act of Congress admitting Wisconsin. And, except in quite a limited degree, no such implication was necessary.

It is true that without further legislation by Congress, and perhaps both by Congress and the new State, this court could not, in every case that might arise, give any direction touching ulterior proceedings.

But this left the great mass of this court's appellate jurisdiction unaffected by the extinction of the territorial government. Whenever there was no error, so that this court must affirm, the process would be complete and no further step could be required. Whenever this court found error and saw cause to reverse, it would execute justice by such reversal. No mandate or notification to the court below of either its affirmance or reversal was necessary to give effect to that judgment. *Gelston* vs. *Hoyt*, 3 *Wheaton* 245, 303 *to* 305; *Webster* vs. *Reid*, 11 *How.* 457.

In cases on demurrer or special verdict, or in equity cases on pleadings and proofs, which were not of original federal cognizance, and in which this court saw cause to reverse, a degree of difficulty might arise as to ulterior proceedings. This court might not feel itself authorized to pronounce a new judgment. Also when a bill of exceptions showed a mis-trial, this court might not have power to order a new trial. But all this only shows that, in some of the cases that might arise under it, the appellate jurisdiction of this court could not, perhaps, go as far to remedy errors as before. To the full extent of finally confirming all correct judgments or decrees of the extinct territorial court, and to the full extent of removing the barriers to justice created by any erroneous judgments or decrees of the territorial court, the appellate powers of this court remained as perfect in form and as benign in effect as ever.

At the very next term after the Wisconsin case of *McNulty* vs. *Batty*, the case of *Webster* vs. *Reid* arose. See it, 11 *Howard*, 437.

It was a writ of error to remove a judgment of the Supreme Court of the Territory of Iowa. Just as in the former case of Wisconsin and the present case of Nevada, the

act for the admission of Iowa as a State made no provision for such cases.—5 Statutes at Large, 742. Yet, acting on the ancient and well-settled principle that the writ of error need not be addressed to the court which gave the judgment complained of, but may go to the place where the record is, and to the court or officer having possession of it, this court acted on a writ of error directed to the supreme court of the *State* of Iowa. It took jurisdiction because the proceeding "was commenced and consummated in the territorial court, over which this court can properly exercise a revisory jurisdiction."—11 *How.*, 457. And this court reversed the judgment of the territorial court. It issued no *mandate*, holding expressly that no such step was necessary, but it ordered "that a statement of this decision be certified to the supreme court of Iowa, meaning, of course, the supreme of the State of Iowa. 11 *How.*, p. 461.

The exercise of appellate jurisdiction by this court in *Benner* vs. *Porter*, 9 *How.*, 242, 243, over a judgment pronounced in a territorial court of Florida, after Florida had been unconditionally admitted as a State, is in harmony with Webster *vs.* Reed, in 11 Howard. And it is the more emphatic as it was done notwithstanding a vehement protest by the appellee's counsel; p. 239.

II.

The second branch of this act, i. e., that relating to ulterior proceedings, is enacted in conformity to the views expressed by this court in reference to such cases. In Benner *vs.* Porter, 9 Howard, 246, it is stated that the records in the territorial courts belong exclusively to the federal government, not only those relating to cases of exclusively federal cognizance, but the records in all cases. The court, speaking by NELSON, J., says: "On the admission of a territorial government into the Union as a State, the concurrence of both the Federal and State governments would seem to be required in the transfer of the records, in cases of appropriate State jurisdiction, from the old to the new government. An act of Congress would be incapable of passing them under the State jurisdiction, as would be an act of the Legislature of the State to take the records out of the custody of the Federal government. Both should concur."

Accordingly, the act of Feb. 27, 1865, now under consideration, declares that, in cases such as the present, "the su-

preme court of the State of Nevada * * shall be the successor of the supreme court of Nevada Territory."

We have no copy of the Constitution of the State of Nevada, nor of any statute adopted by it, if it has yet passed any. But we find it stated in debate by a Senator from that State, and also in the *brief for the defendants in error in this case, p.* 14, that "the constitution adopted [by the State of Nevada] provides for the transfer of causes pending, and judgments rendered in the territorial courts, to the proper courts of the State, and [that] the latter are the legal successors of the former as to all such cases as are not of federal cognizance."

Here is the concurring legislation of the Federal Congress, and of the State, which this court advised in these cases. And if any further legislation on the part of the State be needed, no doubt it will be had.

This court need not, in the strictest sense of the term, issue its "mandate" to the State court when reversing a judgment of the territorial court. As in Webster *vs.* Reid, 11 How., it can certify to the State court its reversal of what the United States territorial court did, leaving the State court to proceed thereon as unto law and justice shall appertain.

In *Benner* vs. *Porter*, 9 *How.*, 247, this court, per NELSON, J., says: "It is to be regretted that proper provision has not always been made by Congress, upon a change of government, in respect to the pending business in the territorial tribunals, so as to remove all embarrassments and perplexity on the subject. * * A very slight attention to the subject by Congress at the time, would remove all the difficulties that have occurred in several of the States recently admitted."

III.

A suit rightfully brought in a court of the United States is, *ex vi termini*, a case "arising under the laws of the United States." The Supreme Court may have "appellate jurisdiction" therein "under such regulations as the Congress shall make." *Const. U. S.*, Art. 3, §§ 1, 2.

That Congress has power of exclusive legislation in the territories while they are such, is indisputable. This includes the power of organizing and regulating courts of justice. Surely it includes the power of allowing and regulating appeals from these courts to this, the High Appellate tribunal of the Constitution.

Because the State has been admitted, and admitted uncon-

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ditionally, must the errors committed by a subordinate judicial tribunal of the United States remain irreversible forever? Taking proper legislative action to secure a judicial review of the acts of its own tribunals cannot be deemed an exercise of jurisdiction peculiarly appropriate to the new State. Quite the contrary; the State could not review or reverse the judgments of the territorial courts. Rendered by a federal tribunal these judgments are irreversible, save by review under the laws of the Union, and by the courts of the Union. No State court can review them; and, if a State court should disregard them as void, its judgment would be reversible in this Court as constituting the denial of a manifest right, claimed under an act of Congress.

It hence follows that if Congress has not power to uphold a right of review after the territory is admitted as a State, the admission of a territory must always carry with it a consecration for all time of every unreversed judicial error committed by the territorial courts. Can this be?

Congress has general power "to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States." *Const., Art.* 1, 58. Surely, having power to erect temporary courts in the territory, it has power to cause the errors of such courts to be judicially reviewed and corrected, although the process of review may happen to require a greater length of time than the public interest permits the United States to continue in existence the territorial government or the territorial courts.

As a sort of make-weight to the defendants' argument, or a palliative of the consequences plainly resulting from their doctrines, it is intimated that Congress might have done all that was necessary in the enabling act under which Nevada came in as a State; but having let slip that opportunity, no remedy can now be applied.

This notion is founded on unsound views.

1. It assumes the much debated and very disputable position, that Congress, when admitting a State into the Union, may impose special conditions upon that favor and place her in a position inferior to that of her elder sisters. 10 Peters, 737.

2. It also assumes that in retaining or exercising authority to cause a review of judgments pronounced by its own judges in its own courts, the Federal Government would exercise a jurisdiction over matters and questions properly of State cognizance. Such is not the fact. It only reverses, if erroneous, and approves, if right, the acts of its own officials.

The notion that the legislative power cannot allow an appeal

to an appropriate judicial tribunal after, by some slip or inadvertence, the time or opportunity for appealing has passed, cannot be maintained. The authorities to the contrary are numerous. It is neither an exercise of judicial power nor an invasion of vested rights. It is merely a legislative regulation of judicial practice. There is no such thing as a vested right in a wrong-doer to evade the exercise of judicial power.

Watkins *vs.* Holman, 16 Peters, 60, 61.
Bull *vs.* Calder, 3 Dallas, 386.
United States *vs.* Sampeyrac, 7 Peters, 222.

J. M. CARLISLE,
of Counsel for Plaintiffs in Error.

IN THE

Supreme Court of the United States

DECEMBER TERM, 1864.—No. 75.

FREEBORN & SHELDON, *Plaintiffs in Error*,

vs.

SMITH & DEY, *Defendants in Error*.

BRIEF OF DEFENDANTS IN ERROR.

The first question in this case arises on the motion of the defendants to dismiss the writ of error. The writ was sued out on a judgment rendered by the Supreme Court of the Territory of Nevada, and was returned to and the record filed in this court at its December term, 1862.

The act of Congress of March, 1861, creating the territorial government of Nevada, under which the writ was sued out, provides generally for appeals and writs of error in all cases where the amount in dispute exceeds a certain sum. The case at bar comes within this provision, but since the writ was granted and the case brought to this court, the act referred to, and the government created by it, have ceased to exist, and been superseded by the establishment of a State government, and the admission of the Territory into the Union as a State. The act under which the Territory became a State was passed by Congress in March, 1864, and contains no provision saving the jurisdiction of this court as conferred by the act of 1861. The provisions of the act fixing the terms

of admission having been fully complied with by the people of the Territory, the State was duly admitted by proclamation of the President, as therein directed.

I submit as a conclusion of law that the jurisdiction of this court ceased with the termination of the act conferring it. The principle invoked is a familiar one, and the court has already considered and passed upon it in cases precisely similar to the present. In the case of McNulty *vs.* Batty (10 How., 72), which was a writ of error to the Supreme Court of the Territory of Wisconsin, the same point was made on a motion to dismiss, and the court sustained it and dismissed the writ.

The case was fully argued both orally and on printed briefs, and the opinion shows that it was carefully considered by the court; and it was afterwards approved and acted upon in Preston *vs.* Bracken (10 How., 81). In the absence of subsequent legislation these cases are decisive of the question, and I am not aware of any such legislation on the subject. If there be any I have not been able to find it, and I am satisfied that there is none. Even if Congress had attempted to save the jurisdiction the attempt would have been ineffectual, so far as this case is concerned. It is not a case belonging to the jurisdiction of the Federal Courts, and any attempt by Congress to control it, or the class of cases to which it belongs, would bring about a collision between Federal and State authority. In any view that can be taken of the matter, I think the motion should be granted and the writ dismissed.

On the merits of the case two points are made by the counsel for the plaintiffs in error. The first is that the evidence was not sufficient to justify the verdict, and the second is that certain letters and telegraphic messages were rejected as evidence.

The first point cannot be considered. It is not the office of a writ of error to bring up for review questions of fact. It is confined entirely to questions of law,

and does not extend to any question of the weight or sufficiency of evidence. It is proper to say, however, that the evidence was, in every respect, sufficient. Two courts have already so held, and, on examination of it, this court would arrive at the same conclusion.

The second point is equally untenable. The question on the trial was as to the existence of a partnership between the plaintiffs in error and one George N. Shaw, deceased. The letters and messages offered in evidence were parts of a correspondence between these parties during the time the partnership is alleged to have existed, except two letters from one Ira A. Eaton, one of which was addressed to Shaw and the other to Freeborn, the latter, however, purporting to have been written for and at the request of Shaw. As to this letter no evidence was offered that Shaw had ever seen it or knew its contents. In regard to some of these documents counsel seems to admit that they were properly rejected, the point as stated by him being confined to the letters and messages of Shaw alone. A complete answer to the point thus stated, assuming the inadmissibility of a portion of the evidence, is that the rejected documents were offered together and not separately. Having been offered together, and some of them being inadmissible, they were all properly rejected. It is true, the record does not show that they were offered together, but it fails to show that they were offered separately, stating merely that they were offered and rejected and that the ruling was excepted to. Whether they were offered together or separately is a matter of inference and presumption, and if we indulge presumptions on the subject we must indulge them in favor of the action of the court and not against it. The objection is a substantial and not a technical one, for conceding the admissibility of a portion of the evidence it does not appear from the record that any error was committed. There can be no doubt that some of the evidence was inadmissible. The letters of Eaton were clearly so, and it is

difficult to see on what ground the other letters, or the messages, could have been received, even if they had been offered separately.

As to the letters and messages of Shaw, the authority cited in support of their admissibility does not sustain the position taken. Declarations and entries by persons since deceased are sometimes admissible in evidence, but in order to render them admissible, they must have been against the interest of the person making them. It nowhere appears, either by evidence *aliunde* or on the face of the documents themselves, that the letters and messages of Shaw were or could have been against his interest. If they were admissible at all, they were admissible on some other ground than that assumed by counsel. My opinion is, that they were not admissible at all; but having referred to the only ground on which their admissibility is claimed, I deem it unnecessary to discuss the matter further. I will say generally, however, that declarations by one of two persons alleged to be partners are not admissible against the other on a question of the existence or non-existence of the partnership, and being inadmissible against him, they are still more clearly so when they are sought to be used in his favor. The object here was to disprove the partnership by declarations of the partners themselves.

I submit that there is no ground on which the judgment should be reversed.

W. W. COPE,

Counsel for Defendants in Error.

Supreme Court of the United States.

DECEMBER TERM, 1864.—No. 75.

FREEBORN & SHELDON, Plaintiffs in Error,

vs.

SMITH & DEY, Defendants in Error.

Supplementary Brief on behalf of Defendants in Error.

W. W. COPE,
Attorney for Defendants in Error.

Gideon & Pearson, Print., 511 9th st., Washington.

Supreme Court of the United States.

FREEBORN & SHELDON, Plaintiffs in Error,

vs.

SMITH & DEY, Defendants in Error.

Supplementary Brief on behalf of Defendants in Error.

In my former brief in this case, I endeavored to show that the court had no jurisdiction, and that the writ of error should be dismissed. In support of that position, I referred to two decisions of the court directly in point, and it is admitted that these decisions were conclusive of the case as it then stood. It is supposed, however, that the ground on which the jurisdiction was objected to has been removed by an act of Congress, and that the court may now proceed to hear and determine the case. Regarding this act as ineffectual for the purpose intended by it, I will state, as briefly as possible, the reasons on which my opinion is based.

The act is a retrospective enactment interfering directly with vested rights. It attempts to confer on this court jurisdiction to review certain judgments which by law at the time of its passage were final and absolute. The necessary result of maintaining it would be to disturb and impair these judgments, unsettle what had been

previously settled, and compel the parties to litigate anew matters already definitively adjudicated. Congress had no power, in the exercise of its proper functions as a legislative body, to pass an act of this character. Vested rights are held by a tenure which subsequent legislation cannot destroy or impair, and there is no higher evidence that rights have vested than a final judgment solemnly confirming them. Such rights depend for their validity solely upon the law in force when they accrued, and when that law has pronounced its judgment upon them, their status is fixed, and cannot be altered. It is not in the power of legislation afterwards to change it. The power to legislate is simply a power to make laws for the government of those over whom such laws are to operate, and no law can be enacted by virtue of this power, which looks to the past, and operates to the prejudice of acts done or things consummated before it was enacted. Law is defined to be a rule of conduct, and to call an enactment which undertakes to deal with past transactions, and subject them to new requirements and conditions as tests of their legality, a rule of conduct, is to confound all rational ideas on the subject. A rule of conduct is a rule which cannot in the nature of things operate in the past; it is a rule for the future only, and not a rule by which past acts are to be judged of, and acquitted or condemned. *Ex post facto* laws are expressly prohibited by the Constitution, but the courts would hardly enforce enactments of this nature, even in the absence of any constitutional prohibition; because being retrospective, and providing for the punishment of acts not illegal when committed, they are not laws in the true sense of that term, and not, therefore, within the sphere of legislative authority. The principle is equally applicable to civil causes, and prevents any injurious intermeddling with past transactions. Legislative power begins and ends with the power to enact laws, and in respect to the conduct of men in their dealings and obligations, and in the acquisition

of property, no valid law can be enacted which undoes or unsettles that which was legally done or settled under a previous law. Men do not hold their rights at the mercy or discretion of the legislature; once vested, they are beyond the reach of legislative interference. "Legislative omnipotence with all its creative energies," says an able writer, "must be regarded as possessing no power under its inherent law-making power, to create or prescribe a rule of civil conduct applicable to the past, affecting vested rights. Every attempt of that kind, from the very nature of the case, must be regarded as ineffectual to attain such an end if designed; and whenever attempted to do so, it should be treated as an abortive act."—(Smith's Com., 292.)

The validity of enactments of this character has frequently been called in question, not only by commentators and philosophical writers, but by jurists of great learning, ability, and eminence. In Merrill vs. Sherburne, (1 N. H., 213,) Mr. Justice Woodbury, says: "Acts of the legislature which look back upon interests already settled or events which have already happened, are retrospective, and our Constitution has in direct terms prohibited them, because highly injurious, oppressive, and unjust. But perhaps their invalidity results no more from this express prohibition, than from the circumstance that in their nature and effect, they are not within the legitimate exercise of legislative power." After speaking of *ex post facto* laws, he adds: "Laws for the decision of civil causes made after the facts on which they operate, *ex jure post facto*, are alike retrospective, and rest on reasons alike fallacious." In Bates vs. Kimball, (2 Chip., 88,) Mr. Justice Aikens, says: "The principle meant to be laid down is that an act not expressly permitted by the Constitution, which impairs or takes away rights vested under pre-existing laws, is unjust, unauthorized, and void." In Staniford vs. Barry, (1 Aik., 314,) Mr. Justice Prentiss, in referring

to the decision in Bates vs. Kimball, and the reasoning on which it was based, says: "The case appears to have been maturely considered, and was decided on principles and authorities which are conclusive of the question. * * * * We have only to add, that the principles adopted have become settled constitutional law, and are universally recognized and acted upon as such, by all judicial tribunals in this country. They are found in the doctrines of learned civilians, and the decisions of able judges, without a single decision, or even opinion or dictum to the contrary. They not only grow out of the letter and spirit of the Constitution, but are founded in the very nature of a free government, and are absolutely essential to the preservation of civil liberty, and the equal and pernament security of rights." In Lewis vs. Webb, (3 Greenl., 335,) Chief Justice Mellen lays it down as a settled and inflexible rule, "that a law retrospective in its operation, acting on past transactions, and in its operation disturbing, impairing, defeating, or destroying vested rights, is void, and cannot and must not receive judicial sanction." In McCabe vs. Emerson, (6 Har. Penn., 111,) Mr. Justice Rogers, after stating that it could not be presumed that the legislature intended to give the act under consideration a refrospective effect, says: "But granting that intention to be clearly expressed, I have no hesitation in saying that the act is unconstitutional and void. The legislature has no power, as has been repeatedly held, to interfere with vested rights." In Metford vs Learned, (16 Mass., 215,) a similar opinion is expressed by Chief Justice Parker, in language equally emphatic.

On examination of these cases, the court will find references to many more, in which the same doctrine is laid down. In most of the cases, however, the courts have based their decisions on some positive constitutional restriction, and have not undertaken to decide the point as a question of legislative power independent of any

constitutional restraint. There can be no doubt as to what they would have done, if the question had arisen in such a shape that they were compelled to pass upon it; and the views expressed in regard to it in the cases I have cited, appear to me to be unanswerable. I have referred to these cases particularly because of their resemblance to the case at bar in respect to their facts, and because I regard them as conclusive of another point on which I shall rely. In each of them, the question was as to the validity of a statute granting an appeal or review where the judgment had become final, the decision being adverse to the validity of the statute, on the ground that it was an interference with vested rights, and on the further ground that it was judicial in its nature. I shall have occasion to refer to these cases again when I come to consider the latter ground as applicable to the act in question here.

There are two cases in this court which are sometimes spoken of as militating against the principle for which I contend in regard to retrospective enactments. The first is the case of Calder vs. Bull, (3 Dallas, 386,) and the second is that of the United States vs. Sampeyrac, (7 Pet., 222,) neither of which justifies the inference thus drawn.

The case of Calder vs. Bull arose on a statute of Connecticut allowing an appeal from a judgment rendered by a probate court of that State, the time for appealing under the law as it stood previously having expired. The statute was passed prior to the adoption of a State constitution, and it was shown to have been the custom of the legislature from a very early period to enact laws of this nature, and exercise a general control over the judiciary in respect to new trials and appeals. The grounds urged against the statute were that it was a judicial and not a legislative act, and that it contravened the clause of the Federal Constitution prohibiting the passage of *ex post facto* laws. The decision of the court was in favor of its

validity, but the judges wrote separate opinions, and assigned different reasons for their conclusion. As to the first ground, some of them held that it was immaterial, there being no provision in the Constitution preventing the legislature of a State from exercising judicial powers. Others held that whether the statute be regarded as judicial or legislative, it was justified by the ancient and uniform practice of the legislature, and should be maintained. It was unanimously agreed that the prohibition referred to only applied to criminal enactments, and that a State statute affecting civil rights merely was not within it. This was the whole case, and the decision certainly has no effect upon the principle contended for here.

The case of the United States vs. Sampeyrac brought in question the validity of an act of Congress extending the provisions of a previous act, so as to enable the territorial courts of Arkansas to entertain bills of review on the part of the United States in cases of forgery and fraud. The court will see at once that no interference with vested rights was contemplated by the act, the effect of which was simply to invest certain tribunals with equitable powers not possessed by them before, to be exercised in a class of cases over which the ordinary jurisdiction of courts of equity has always extended. It is a part of the general jurisdiction of these courts to investigate matters of fraud, and grant relief to the parties injured by them; and it was, of course, competent for Congress to confer this jurisdiction on the courts of Arkansas. It did this, and nothing more, leaving those courts to proceed in accordance with the settled principles governing courts of equity in such cases. It was on this ground mainly that the court sustained the act, holding in respect to the merits of the case that the judgment in question was fraudulent, and that no rights had vested under it. The decision, therefore, is not in point; but there are expressions in the opinion which show very clearly the views of the court as to the sanctity of vested rights. "It

forms no objection to the law," says the court, "that the cause of action existed antecedent to its passage, so far as it applies to the remedy, and does not affect the right."

I do not, of course, question the validity of retrospective statutes that are purely remedial, that give a remedy without disturbing or impairing rights. Such statutes, considered as rules of conduct, are rules for the courts, and only affect past transactions so far as they control the courts when called upon to enforce them. Their object is to preserve rights, and not to impair or take them away, and the courts have uniformly maintained them. There is no such thing as a vested right in a remedy, and so long as no right is invaded, the legislature may deal with the remedy as it pleases. Whenever it attempts to interfere with a right, however, it passes at once the bounds of its authority, and its acts are void. This is the principle for which I contend, and there can be no doubt that the case falls within it.

What is the court asked to do? It is asked to review a judgment on which the law has already pronounced its sentence of finality. It is asked to do this on the authority of an act of Congress, which proposes to set aside this sentence, and change the judgment from a final one to one that may be reversed on appeal. The act concedes that the judgment has become final, but declares that it shall not remain so, and deprives the parties of any benefit from it until the matters settled by it are again adjudicated. If it be possible for a vested right to attach itself to a judgment, it has certainly done so here, and there could not be a plainer case of an attempt to destroy it by legislative action. It is immaterial, of course, that the court ever had jurisdiction; if it proceed at all, it must proceed under the jurisdiction conferred by the act, and not under that which it formerly had. The case stands precisely as if the judgment had been rendered by a court of last resort.

My next position is, that in passing the act Congress

attempted to exercise power judicial in its nature, and not legislative. It is unnecessary to consider as a possible question the authority of Congress to pass the act, conceding it to be judicial; such a question would not receive the attention of the court. The powers of Congress are defined by the Constitution, and, with certain exceptions having no relevancy in this case, they are purely and strictly legislative; the judicial power of the Government being confided to the courts. If it should be held that the power exercised here was of this nature, it will follow as a necessary conclusion that the act is void.

In presenting this point, I shall not undertake to define the terms *judicial power*, as used in the Constitution. No particular definition of them is given in the Coustitution itself; but they were used, of course, with reference to the power previously exercised by courts of common law and equity in this country and in England. In order, therefore, to ascertain their meaning, and the subjects embraced by them, it is necessary to consult the usages and practice of these courts anterior to the adoption of the Constitution; but even from these sources it would be impossible perhaps to deduce a general rule indicating with entire accuracy the boundaries of this power. Cases have frequently arisen in which particular acts have been held to be within it, but these cases have been decided on their own circumstances, and without reference to general rules or definitions. It is much more easy to determine the application of the power to a given subject than to assign definite limits to the power itself. Whether it embraces a particular case may be a question of no difficulty; but it would be very difficult, if not impracticable, to lay down a rule embracing every case that could possibly arise. What principally distinguishes judicial from legislative power is that the one is creative and the other administrative; the one creates or enacts laws by which the community is to be governed, and the other

administers those laws as between the members of which the community is composed. Laws cannot be enacted by the exercise of judicial power, nor can they be administered by the exercise of legislative power, the two powers, even when united in the same body, being themselves separate and distinct. The manner in which judicial power shall be exercised is the subject of legislative control, but beyond this legislative power does not extend; it cannot be employed in the performance of judicial functions. The enacting of laws under which judicial power must be exercised is a very different thing from that of exercising the power itself. Suits must be brought in the mode pointed out by legislative authority, but the power invoked in bringing them is judicial, and every step subsequently taken in them is taken by virtue or within the operation of this power. Those matters of which the courts assume jurisdiction, and particularly those appertaining to the trial and determination of causes, are clearly and necessarily the subjects of judicial power. Such matters include all of the proceedings in a cause from its commencement to its termination, and it is certain that within these limits no other than judicial power can be exercised. Filing a complaint, summoning and empanneling a jury, rendering a verdict or judgment, granting or refusing a new trial, taking an appeal or suing out a writ of error, are all acts pertaining to the jurisdiction of the courts, and within the operation of this power. They must be done in pursuance of some law prescribed by legislative authority, but considered merely as acts done, or to be done, in the progress of a cause, a legislative body has no power or control over them, either to command the doing of them, or to set them aside when done. No one will deny that rendering a judgment is strictly a judicial act, and it is evident that the power exercised in rendering it must also be exercised in setting it aside, for the act of setting a judgment aside, like the judgment itself, is simply a proceeding in the cause.

And so as to every act that may be done in a cause, from its inception to its close; it is merely a proceeding in the cause, and is purely judicial in its nature. There is no difference in this respect between one act or one proceeding in a cause and another, they are alike judicial in their nature, and exclusively the subjects of judicial power. If one such act may be done or undone by legislative authority, there is no reason why the same authority may not be employed to do or undo every act throughout the proceedings. The question ceases to be a question of power, and becomes one of discretion only.

It is not my purpose, however, to discuss the point at length. There are numerous cases in which it has been decided, and the question has been so fully considered, and so elaborately reasoned, it is impossible to present any new views in regard to it. In addition to what I have said, I desire merely to call the attention of the court to a few cases, and particularly to those I have already cited. They are, as I have before stated, directly in point; and the opinion of Mr. Justice Woodbury in Merrill vs. Sherburne, of Mr. Justice Aikens in Bates vs. Kimball, and of Chief Justice Mellen in Lewis vs. Webb, are able and exhaustive discussions of the subject. In the first of these cases, the question was as to the validity of a statute granting a new trial after final judgment, and in the other two, as to the validity of statutes granting an appeal where the judgments had also become final. It was held that the statutes were unconstitutional and void, that their effect was to take away the legal force of the judgments to which they applied, and that in respect to these judgments they amounted to orders or decrees which the courts alone were competent to make. In his opinion in the first case, Mr. Justice Woodbury says: "The granting of a new trial belongs to the courts from immemorial usage. The power to grant a new trial is incidental to their other powers. It is a judgment in relation to a private controversy, affects what has already happened, and results from a com-

parison of evidence and claims with the existing laws. It will not be denied that the consideration and decision by the superior court of the motion for this same new trial was an exercise of judicial power. If so, a consideration and decision upon the same subject by the legislature must be an exercise of power of the same description; for what is in its nature judicial to-day, must be judicial to-morrow and forever." In the second case, Mr. Justice Aikens says: "This act, in the first instance, alters the decision of the commissioners from a final and absolute judgment on the merits, to a judgment *nisi*, or in other words, to a judgment liable to be vacated by the act of the party in entering his appeal; and, secondly, through the act of the party in entering his appeal, it alters it to a judgment vacated. That a judgment appealed from is a judgment vacated, is evident from the fact that by the appeal the parties are thrown back upon the original cause of action, and are compelled to litigate anew that which would otherwise be concluded by the judgment itself." After remarking again that the effect of the act was to vacate the judgment, and to direct another trial of the matters determined by it, he adds: "It is immaterial whether that effect be produced by authorizing an extraordinary appeal in a case not within, and, of course, not conformably to the laws, or whether it be done by ordering a new trial before the same court. The mischief is the same. It is not by the mode of doing a thing, nor by the pretended capacity in which it is done, but by the nature of the act itself, that its propriety or impropriety is to be determined. To what department, then, do the common law and usages refer us, in view of these proceedings? Most certainly to the judiciary." In the third case, Chief Justice Mellen says: "Whatever may be considered the nature and character of the decree since the appeal was claimed, it is very clear that at the time the legislature passed the resolve, it was in full force and virtue; and had been for almost five years. The rights

of heirs and creditors in the subject-matter of the decree vested when it was rendered, and so remained undisturbed until the resolve professed to grant the appellants leave to disturb them. The ordinary and legal consequences of an appeal is to vacate at once the judgment or decree appealed from. * * * This appeal cannot be sustained on any other principle than that of its having produced the usual effect of an ordinary appeal; that is, having vacated the decree below. Can the legislature, by a mere resolve, set aside a judgment or decree of a court, and render it null and void? This is an exercise of power common in courts of law, a power not questioned; but it is one purely judicial in its nature and its consequences. * * * It is true the resolve does not in terms purport to transfer property directly from one man to another by mere legislative authority, but it professes to grant to one party in a cause, which has been, according to existing laws, finally decided, special authority to compel the other party, contrary to the general law of the land, to submit his cause to another court for trial; the consequence of which may be the total loss of all those rights and all that property which the judgment complained of had entitled him, and those claiming through or under him, to hold and enjoy; that is to say, it professes to accomplish in an indirect and circuitous manner that which the existing laws forbid, and which, by a direct and legal course, cannot be attained; and to perform an act respecting a cause between party and party, an act, therefore, of a judicial character, in the simple form of legislation."

These cases were decided not only on reasoning the most conclusive, but on authorities of the highest respectability and weight. To these authorities I also ask the attention of the court; and on examination of the subject I think the court will concur in the language of Judge Swift, that "The human mind cannot imagine a greater absurdity than to establish courts of law and equity, to

determine all questions of right between man and man, and then to admit the legislature to exercise a sovereign authority in relieving against their determinations."—(Treatise on Laws of Conn., 76.)

The act of Congress is clearly within the principles here laid down. It undertakes to grant an appeal or review in certain cases in which there was no right of review at the time of its passage. The cases had been prosecuted as far as they could be under the law as it then stood, and if they may be prosecuted farther now, it is because Congress has the power to open the judgments, and direct the matters in controversy to be tried anew. The act operates as a judicial order in each of the cases to which it applies.

It is proper to suggest that the principle on which the act proceeds is utterly subversive of the sanctity of judicial proceedings. No decision can ever be absolutely binding, and the doctrine of *res adjudicata* can only be asserted in the absence of legislation depriving the judgment of its conclusive force. If the principle exists, it may be applied at any time, and in all cases, the question of its application being purely a matter of legislative discretion. It is a principle which subjects all judgments to the controlling power of the legislature, and no lapse of time, or state of circumstances, can be regarded as constituting a barrier to its exercise. A judgment rendered twenty years ago, and fully executed, is no more sacred than one rendered on yesterday, and under which nothing has been done; nor is a judgment of this court exempt from the rule resulting from the power claimed. If Congress may grant an appeal in a case of this character, it may grant a rehearing after that appeal has been determined, and the court may be kept constantly employed reviewing its own judgments. No point can ever be reached beyond which Congress cannot act, and no judgment can ever become final in that sense which precludes the possibility of legislative interference. If

there were no other argument against the existence of such a power, the consequences flowing from its recognition ought to be sufficient.

I am aware that in Benner vs. Porter, (9 How., 235,) the court assumed jurisdiction of an appeal given by an act of this nature, but it seems to have done so without argument, and without any consideration of the question of the power of Congress to pass the act. Under such circumstances, I submit that the case should not be regarded as conclusive; that the question should be treated as an open one, and determined upon its merits.

If I am mistaken, however, in my views thus far, there is still a fatal objection to the act in its application to the present case. The case is not one of Federal jurisdiction, and if the act can be maintained at all, it must be limited to cases within the constitutional jurisdiction of the court. The act organizing the Territory of Nevada having been abrogated by the admission of the Territory as a State, it cannot be claimed that the court has any jurisdiction coming from that act, or that the jurisdiction created by the present act relates back and attaches itself to the jurisdiction existing under the territorial organization. It is to this act alone that the court must look for its jurisdiction, and so far as the act undertakes to deal with cases of which the court has no jurisdiction conferred upon it by the Constitution, it is ineffectual and void. The State was admitted with no conditions annexed, and no reservations of power as conferred by the organic act of the Territory; and it was admitted, of course, on an equal footing with the other States, and with the same powers and jurisdiction. The Constitution adopted provides for the transfer of causes pending and judgments rendered in the territorial courts to the proper courts of the State, and the latter are the legal successors of the former as to all such cases as are not of Federal cognizance. Of this there can be no doubt, and it was not competent for Congress to with-

draw these cases from the jurisdiction of the State courts; its attempt to do so, and to subject them to the jurisdiction of this court, was an attempt to confer on the court jurisdiction not warranted by the Constitution. The Federal courts can only be regarded as the successors of the territorial courts in respect to Federal cases, such being the extent of their jurisdiction since the annullment of the territorial organization, and the unconditional admission of the Territory as a State. These views are fully sustained by the case of Benner vs. Porter, before referred to, and that of McNulty vs. Batty, (10 How., 72.)

I respectfully submit that the writ should be dismissed notwithstanding the act of Congress.

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